1.12/3:3/8

SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY

Volume 3, No. 8, Pages 2035 to 2423,
April 11 - April 22, 1988.

# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the **FCC Record**. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the **FCC Record** should include the volume number, page number, and year. See 47 C.F.R.§1.14. Earlier Commission documents may continue to be cited to the **FCC Reports**.

Citation Form: 2 FCC Rcd 1 (1987)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

MAY 26 1988

Depository Document

# Federal Communications Commission Record

Volume 3
Issue 8

## Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... v

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material.....2035

# Federal Communications Commission Record

## Table of Cases
## Volume 3
## Issue 8


| Case Name | Page |
|---|---|
| AT&T Company - Network Channel Terminating Equipment | 2116 |
| Advanced Paging & Communications, Inc. | 2306 |
| Advanced Televsion Service Implementation Subcommittee Meeting | 2181 |
| Aetna Life Insurance Co., Aetna Casualty and Surety Co. | 2126 |
| Alascom, Inc. | 2316 |
| Amendment of Part 2 | 2212 |
| American Telephone and Telegraph Company | 2240 |
| American Telephone and Telegraph Company | 2064 |
| Annual 1988 Access Tariff Filings - Phase I | 2043 |
| Arizona Board of Regents | 2308 |
| Bay Springs Telephone Co. | 2133 |
| Bayboro Broadcasting | 2150 |
| BellSouth Telephone Companies | 2241 |
| Benns, Ying Hua | 2143 |
| Comparably Efficient Interconnection Plans | 2242 |
| Continental Telephone Company of Indiana, Inc. | 2120 |
| Coyle Communications, Ltd. | 2302 |
| Crescomm Transmission Services, Inc. | 2149 |
| Digital Paging Systems of Philadephia, Inc. | 2304 |
| Distribution of U.S. Carrier Circuits | 2156 |
| Earth Station Antennas | 2062 |
| Fairness Doctrine Alternatives | 2050 |
| Faith Broadcasting, Inc. | 2178 |
| Filing Procedures for Mobile Services Division | 2172 |
| Garcia, Armando | 2059 |
| General Telephone Company of California | 2317 |
| Global Telegraph Corporation | 2237 |
| Hudson Valley Mobile Telephone, Inc. | 2119 |
| Hughes Communications Galaxy, Inc. | 2236 |
| ITU Region 2 Administrative Radio Conference | 2345 |
| Interference Between UHF Channels and Land Mobile Channel | 2335 |
| La Crescent Community Broadcasters | 2332 |
| Laustsen, David | 2053 |
| Martin Intermart, Inc. | 2155 |
| Media Investment Corp. | 2152 |
| Mountain States Telephone and Telegraph Company | 2314 |
| NECA's Proposed Revisions to Average Schedules for 1988 | 2070 |
| New York Telephone Company | 2311 |
| Noncommercial FM Translators - FNPRM | 2202 |
| Noncommercial FM Translators - Report and Order | 2196 |
| Omaha Channel 54 Broadcasting Group, Limited Partnership | 2142 |
| Public Safety National Plan and Amendment of Part 90 | 2113 |

| Case Name | Page |
|---|---|
| Public Service Company of Oklahoma | 2327 |
| RKO General, Inc. | 2270 |
| RKO General, Inc. (Docket No. 16679) | 2061 |
| Radio Indio Corporation | 2147 |
| Rebecca Radio of Marco, A Limited Partnership | 2256 |
| Reorganization and Deregulation of Part 97 | 2076 |
| Revision of Section 73.3573(a)(1) | 2192 |
| Southern New England Telephone Co. | 2154 |
| Southwestern Bell Telephone Co. | 2339 |
| Southwestern Bell and Ameritech - Cost Allocation Manuals | 2068 |
| Southwestern Bell-Loop Status Verification Service | 2182 |
| Surber, Janice Faye | 2177 |
| Synapse Tenant Leasing, Ltd. | 2239 |
| Syracuse Peace Council | 2035 |
| TGE Communications, Inc. | 2122 |
| Table of Allotments, FM, Arcadia, MI | 2217 |
| Table of Allotments, FM, Ariton, AL and Bonifay, FL | 2226 |
| Table of Allotments, FM, Atlanta, TX | 2180 |
| Table of Allotments, FM, Bad Axe, MI | 2184 |
| Table of Allotments, FM, Bayard, NE | 2223 |
| Table of Allotments, FM, Bogue Chitto and Utica, MS | 2136 |
| Table of Allotments, FM, Boothbay Harbor, Maine | 2183 |
| Table of Allotments, FM, Bryan and College Station, TX | 2263 |
| Table of Allotments, FM, Canaan, VT | 2262 |
| Table of Allotments, FM, Cloquet and Grand Marais, MN | 2185 |
| Table of Allotments, FM, Conklin, NY | 2254 |
| Table of Allotments, FM, Denison, TX | 2206 |
| Table of Allotments, FM, Grifton, NC | 2231 |
| Table of Allotments, FM, Kotzebue, AK | 2264 |
| Table of Allotments, FM, Larned, KS | 2187 |
| Table of Allotments, FM, Las Cruces and Deming, NM | 2135 |
| Table of Allotments, FM, Lehigh Acres, FL. | 2191 |
| Table of Allotments, FM, Lenoir, NC | 2219 |
| Table of Allotments, FM, Litchfield, MN | 2261 |
| Table of Allotments, FM, Livingston, TX | 2179 |
| Table of Allotments, FM, Los Banos, CA | 2258 |
| Table of Allotments, FM, Marathon, FL | 2225 |
| Table of Allotments, FM, Marlboro,VT | 2137 |
| Table of Allotments, FM, McFarland and Cartago, CA | 2229 |
| Table of Allotments, FM, Mora and Nisswa, MN | 2215 |
| Table of Allotments, FM, Neptune Beach/Green Cove Springs, FL | 2195 |
| Table of Allotments, FM, New London, NH | 2221 |
| Table of Allotments, FM, Osceola, AR | 2309 |
| Table of Allotments, FM, Outlook, MT | 2140 |
| Table of Allotments, FM, Pentwater, MI | 2213 |
| Table of Allotments, FM, Santa Isabel, PR and Christiansted, VI | 2336 |
| Table of Allotments, FM, Seaside, CA | 2138 |

| Case Name | Page |
|---|---|
| Table of Allotments, FM, Sioux Center, IA and Sioux Falls, SD | 2252 |
| Table of Allotments, FM, Sioux Rapids, IA | 2139 |
| Table of Allotments, FM, Socorro, NM | 2266 |
| Table of Allotments, FM, St. Joseph, TN | 2267 |
| Table of Allotments, FM, Staunton, VA | 2268 |
| Table of Allotments, FM, Summerville, SC | 2189 |
| Table of Allotments, FM, Thief River Falls, MN | 2265 |
| Table of Allotments, FM, Wabasha, MN | 2210 |
| Table of Allotments, FM, Webb City, MO | 2141 |
| Table of Allotments, FM, Woodbury, TN | 2250 |
| Table of Allotments, TV, Albany, Buffalo, Ilion, Utica, NY | 2208 |
| Table of Allotments, TV, Grand Junction, CO | 2071 |
| Time Limit on Information Bulletins | 2069 |
| Turner Broadcasting and Communications | 2233 |
| UN2JC Communications (Limited) | 2243 |
| US Sprint Communications Company | 2063 |
| Underwood, Sue A. | 2260 |
| Viacom Broadcasting of Missouri, Inc. | 2176 |
| Victory Media, Inc. | 2073 |
| Welch, Bill | 2234 |
| Word of Life Ministries, Inc. | 2060 |

## Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 8


| Delegated Authority or FCC Number | Page | Delegated Authority or FCC Number | Page |
|---|---|---|---|
| DA 88-0294 | 2043 | DA 88-0481 | 2184 |
| DA 88-0370 | 2059 | DA 88-0482 | 2185 |
| DA 88-0371 | 2240 | DA 88-0483 | 2187 |
| DA 88-0425 | 2206 | DA 88-0484 | 2189 |
| DA 88-0429 | 2212 | DA 88-0485 | 2309 |
| DA 88-0437 | 2143 | DA 88-0486 | 2258 |
| DA 88-0441 | 2152 | DA 88-0488 | 2182 |
| DA 88-0442 | 2150 | DA 88-0489 | 2242 |
| DA 88-0443 | 2147 | DA 88-0490 | 2142 |
| DA 88-0447 | 2335 | DA 88-0491 | 2311 |
| DA 88-0448 | 2062 | DA 88-0492 | 2314 |
| DA 88-0449 | 2063 | DA 88-0493 | 2316 |
| DA 88-0451 | 2064 | DA 88-0494 | 2179 |
| DA 88-0452 | 2155 | DA 88-0495 | 2180 |
| DA 88-0453 | 2068 | DA 88-0496 | 2237 |
| DA 88-0454 | 2069 | DA 88-0499 | 2239 |
| DA 88-0455 | 2070 | DA 88-0500 | 2191 |
| DA 88-0456 | 2116 | DA 88-0502 | 2236 |
| DA 88-0457 | 2120 | DA 88-0504 | 2317 |
| DA 88-0458 | 2241 | DA 88-0505 | 2210 |
| DA 88-0459 | 2181 | DA 88-0506 | 2226 |
| DA 88-0460 | 2119 | DA 88-0507 | 2213 |
| DA 88-0461 | 2122 | DA 88-0508 | 2229 |
| DA 88-0462 | 2126 | DA 88-0509 | 2231 |
| DA 88-0463 | 2071 | DA 88-0511 | 2215 |
| DA 88-0464 | 2176 | DA 88-0512 | 2234 |
| DA 88-0465 | 2133 | DA 88-0513 | 2217 |
| DA 88-0466 | 2135 | DA 88-0514 | 2219 |
| DA 88-0467 | 2149 | DA 88-0515 | 2221 |
| DA 88-0468 | 2208 | DA 88-0516 | 2223 |
| DA 88-0469 | 2136 | DA 88-0517 | 2225 |
| DA 88-0470 | 2137 | DA 88-0518 | 2261 |
| DA 88-0471 | 2138 | DA 88-0520 | 2262 |
| DA 88-0472 | 2139 | DA 88-0521 | 2263 |
| DA 88-0473 | 2140 | DA 88-0522 | 2264 |
| DA 88-0474 | 2141 | DA 88-0523 | 2265 |
| DA 88-0475 | 2183 | DA 88-0524 | 2266 |
| DA 88-0476 | 2177 | DA 88-0525 | 2267 |
| DA 88-0477 | 2178 | DA 88-0526 | 2306 |
| DA 88-0479 | 2154 | DA 88-0527 | 2304 |
| DA 88-0480 | 2339 | DA 88-0529 | 2308 |

| Delegated Authority or FCC Number | Page |
|---|---|
| DA 88-0534 | 2250 |
| DA 88-0536 | 2252 |
| DA 88-0537 | 2254 |
| DA 88-0538 | 2268 |
| DA 88-0544 | 2327 |
| DA 88-0545 | 2332 |
| DA 88-0552 | 2053 |
| FCC 88-0082 | 2345 |
| FCC 88-0097 | 2336 |
| FCC 88-0103 | 2192 |
| FCC 88-0106 | 2195 |
| FCC 88-0119 | 2061 |
| FCC 88-0121 | 2076 |
| FCC 88-0122 | 2156 |
| FCC 88-0125 | 2196 |
| FCC 88-0126 | 2202 |
| FCC 88-0130 | 2050 |
| FCC 88-0131 | 2035 |
| FCC 88-0132 | 2113 |
| FCC 88-0133 | 2172 |
| FCC 88-0134 | 2073 |
| FCC 88D-011 | 2270 |
| FCC 88D-012 | 2243 |
| FCC 88D-013 | 2302 |
| FCC 88D-014 | 2233 |
| FCC 88R-018 | 2060 |
| FCC 88R-022 | 2256 |
| FCC 88R-023 | 2260 |

## Table of Cases by Docket Number
Volume 3
Issue 8


| Docket Number | | Page |
|---|---|---|
| CC Dkt.No.83 - | 752 | 2116 |
| CC Dkt.No.87 - | 67 | 2156 |
| CC Dkt.No.88 - | 1 | 2043 |
| CC Dkt.No.88 - | 161 | 2172 |
| CC Dkt.No.88 - | 180 | 2339 |
| GEN Dkt.No.84 - | 467 | 2345 |
| GEN Dkt.No.87 - | 14 | 2212 |
| GEN Dkt.No.87 - | 112 | 2113 |
| MM Dkt.No.84 - | 1033 | 2073 |
| MM Dkt.No.84 - | 1184 | 2270 |
| MM Dkt.No.85 - | 170 | 2142 |
| MM Dkt.No.85 - | 211 | 2336 |
| MM Dkt.No.85 - | 298 | 2059 |
| MM Dkt.No.85 - | 392 | 2243 |
| MM Dkt.No.86 - | 87 | 2180 |
| MM Dkt.No.86 - | 112 | 2196 |
| MM Dkt.No.86 - | 112 | 2202 |
| MM Dkt.No.86 - | 148 | 2071 |
| MM Dkt.No.86 - | 268 | 2179 |
| MM Dkt.No.86 - | 326 | 2208 |
| MM Dkt.No.86 - | 363 | 2155 |
| MM Dkt.No.86 - | 430 | 2136 |
| MM Dkt.No.86 - | 475 | 2135 |
| MM Dkt.No.86 - | 477 | 2225 |
| MM Dkt.No.86 - | 504 | 2233 |
| MM Dkt.No.87 - | 26 | 2050 |
| MM Dkt.No.87 - | 59 | 2140 |
| MM Dkt.No.87 - | 87 | 2060 |
| MM Dkt.No.87 - | 115 | 2138 |
| MM Dkt.No.87 - | 129 | 2137 |
| MM Dkt.No.87 - | 179 | 2263 |
| MM Dkt.No.87 - | 183 | 2264 |
| MM Dkt.No.87 - | 187 | 2184 |
| MM Dkt.No.87 - | 244 | 2256 |
| MM Dkt.No.87 - | 277 | 2267 |
| MM Dkt.No.87 - | 285 | 2183 |
| MM Dkt.No.87 - | 293 | 2262 |
| MM Dkt.No.87 - | 308 | 2266 |
| MM Dkt.No.87 - | 323 | 2141 |
| MM Dkt.No.87 - | 380 | 2265 |
| MM Dkt.No.87 - | 412 | 2261 |
| MM Dkt.No.87 - | 418 | 2139 |
| MM Dkt.No.87 - | 435 | 2191 |
| MM Dkt.No.87 - | 465 | 2335 |
| MM Dkt.No.87 - | 573 | 2260 |
| MM Dkt.No.88 - | 61 | 2302 |
| MM Dkt.No.88 - | 118 | 2192 |
| MM Dkt.No.88 - | 142 | 2143 |
| MM Dkt.No.88 - | 144 | 2187 |
| MM Dkt.No.88 - | 145 | 2189 |
| MM Dkt.No.88 - | 146 | 2309 |
| MM Dkt.No.88 - | 147 | 2258 |
| MM Dkt.No.88 - | 148 | 2226 |
| MM Dkt.No.88 - | 149 | 2210 |
| MM Dkt.No.88 - | 150 | 2147 |
| MM Dkt.No.88 - | 151 | 2150 |
| MM Dkt.No.88 - | 152 | 2206 |
| MM Dkt.No.88 - | 153 | 2226 |
| MM Dkt.No.88 - | 153 | 2229 |
| MM Dkt.No.88 - | 154 | 2231 |
| MM Dkt.No.88 - | 155 | 2213 |
| MM Dkt.No.88 - | 156 | 2215 |
| MM Dkt.No.88 - | 157 | 2217 |
| MM Dkt.No.88 - | 158 | 2219 |
| MM Dkt.No.88 - | 159 | 2221 |
| MM Dkt.No.88 - | 160 | 2223 |
| MM Dkt.No.88 - | 162 | 2152 |
| MM Dkt.No.88 - | 164 | 2250 |
| MM Dkt.No.88 - | 165 | 2252 |
| MM Dkt.No.88 - | 166 | 2254 |
| MM Dkt.No.88 - | 167 | 2268 |
| MM Dkt.No.88 - | 170 | 2176 |
| MM Dkt.No.88 - | 172 | 2177 |
| MM Dkt.No.88 - | 181 | 2332 |
| MM Dkt.No.88 - | 477 | 2178 |
| MM Dkt.No.88 - | 143 | 2185 |
| PR Dkt.No.88 - | 139 | 2076 |

# Federal Communications Commission Record

## Table of Cases by Rulemaking Number
## Volume 3
## Issue 8


| Rulemaking Number | Page |
|---|---|
| RM - 4740 | 2336 |
| RM - 4829 | 2212 |
| RM - 4831 | 2212 |
| RM - 4931 | 2071 |
| RM - 4983 | 2212 |
| RM - 5094 | 2180 |
| RM - 5219 | 2196 |
| RM - 5265 | 2179 |
| RM - 5310 | 2136 |
| RM - 5323 | 2208 |
| RM - 5341 | 2141 |
| RM - 5535 | 2140 |
| RM - 5538 | 2138 |
| RM - 5540 | 2225 |
| RM - 5564 | 2184 |
| RM - 5572 | 2135 |
| RM - 5588 | 2208 |
| RM - 5592 | 2208 |
| RM - 5636 | 2264 |
| RM - 5651 | 2263 |
| RM - 5681 | 2137 |
| RM - 5687 | 2136 |
| RM - 5732 | 2265 |
| RM - 5769 | 2139 |
| RM - 5773 | 2267 |
| RM - 5786 | 2262 |
| RM - 5813 | 2183 |
| RM - 5828 | 2266 |
| RM - 5840 | 2191 |
| RM - 5914 | 2261 |
| RM - 5952 | 2258 |
| RM - 5978 | 2252 |
| RM - 6018 | 2215 |
| RM - 6033 | 2226 |
| RM - 6048 | 2309 |
| RM - 6101 | 2226 |
| RM - 6125 | 2268 |
| RM - 6128 | 2210 |
| RM - 6149 | 2213 |
| RM - 6150 | 2217 |
| RM - 6159 | 2185 |
| RM - 6167 | 2187 |
| RM - 6198 | 2252 |
| RM - 6200 | 2231 |
| RM - 6201 | 2189 |
| RM - 6202 | 2223 |
| RM - 6203 | 2219 |
| RM - 6204 | 2221 |
| RM - 6245 | 2250 |
| RM - 6251 | 2254 |
| RM - 6273 | 2226 |
| RM - 6273 | 2229 |
| RM - 6291 | 2206 |

## Table of Cases by City
Volume 3
Issue 8


| City/State | Page | City/State | Page |
|---|---|---|---|
| Aberdeen, SD | 2053 | Larned, KS | 2187 |
| Albany, NY | 2208 | Las Cruces, NM | 2135 |
| Arcadia, MI | 2217 | Las Vegas, NV | 2155 |
| Ariton, AL | 2226 | Lehigh Acres, FL | 2191 |
| Atlanta, TX | 2180 | Lenoir, NC | 2219 |
| Bad Axe, MI | 2184 | Litchfield, MN | 2261 |
| Bayard, NE | 2223 | Livingston, TX | 2179 |
| Bayboro, NC | 2150 | Los Angeles, CA | 2270 |
| Bensalem, PA | 2304 | Los Banos, CA | 2258 |
| Bogue Chitto, MS | 2136 | Marathon, FL | 2225 |
| Bonifay, FL | 2226 | Marco, FL | 2256 |
| Boothbay Harbor, ME | 2183 | Marlboro, VT | 2137 |
| Boston, MA | 2208 | McFarland, CA | 2229 |
| Bryan, TX | 2263 | Merced, CA | 2152 |
| Buffalo, NY | 2208 | Minot, ND | 2178 |
| Canaan, VT | 2262 | Mora, MN | 2215 |
| Cartago, CA | 2226 | Neptune Beach, FL | 2195 |
| Cerritos, CA | 2317 | New London, NH | 2221 |
| Charleston, SC | 2260 | Nisswa, MN | 2215 |
| Christiansted, VI | 2336 | Norwalk, CA | 2061 |
| Cloquet, MN | 2185 | Omaha, NE | 2142 |
| College Station, TX | 2263 | Osceola, AR | 2309 |
| Conklin, NY | 2254 | Outlook, MT | 2140 |
| Corning, NY | 2302 | Pentwater, MI | 2213 |
| Corpus Christi, TX | 2122 | Santa Isabel, PR | 2336 |
| Deming, NM | 2135 | Seaside, CA | 2138 |
| Denison, TX | 2206 | Shreveport, LA | 2060 |
| El Paso, TX | 2243 | Sioux Falls, SD | 2252 |
| Florence, AL | 2234 | Sioux Rapids, IA | 2139 |
| Grand Junction, CO | 2071 | Socorro, NM | 2266 |
| Grand Marais, MN | 2185 | St. Joseph, TN | 2267 |
| Green Cove Springs, FL | 2195 | St. Louis, MO | 2176 |
| Greenfield, CA | 2143 | Staunton, VA | 2268 |
| Grifton, NC | 2231 | Summerville, SC | 2189 |
| Guadalupe, CA | 2059 | Syracuse, NY | 2035 |
| Gulfport, MS | 2133 | Thief River Falls, MN | 2265 |
| Ilion, NY | 2208 | Tucson, AZ | 2308 |
| Indio, CA | 2147 | Utica, MS | 2136 |
| Jellico, TN | 2177 | Utica, NY | 2208 |
| Katy, TX | 2073 | Victoria, TX | 2233 |
| Kotzebue, AK | 2264 | Wabasha, MN | 2210 |
| La Crescent, MN | 2332 | Webb City, MO | 2141 |

Subject Index
Volume 3
Issue 8


| Subject | Page |
|---|---|
| Adjudication | |
| Administrative Law Judge Decision | |
| Orders or Notices | |
| New service v. expansion of existing service | 2152 |
| Obstruction by competing applicant | 2152 |
| Programming, specialized | 2152, 2176 |
| Reopening of record | 2152, 2176 |
| Translator | 2233 |
| Review Board or Commission Decision | |
| Reopening of record | 2233 |
| Broadcast Radio Services - General Rules | |
| Program contents | |
| Fairness Doctrine | 2035 |
| Broadcasting - FM Stations | |
| Allotments and assignments | |
| Allotments, table of | 2135, 2136, 2139, 2140, 2184, 2185, 2309, 2191, 2180, 2206, 2231, 2213, 2219, 2221, 2258, 2250, 2268, 2261, 2265, 2266, 2229 |
| Broadcasting - TV Stations | |
| Allocations/assignments/licenses | |
| Table of assignments | 2208, 2263, |
| Common Carriers: Miscellaneous Rules | |
| Common carriers, miscellaneous rules relating to | |
| Enhanced services (computer) and customer-premises equipment | 2182 |

| Subject | Page |
|---|---|
| Communications Act of 1934 | |
| | 2154 |
| | 2126 |
| Commission authorized to prescribe, just and reasonable | 2339 |
| Complaints to the commission | 2239 |
| Extension of lines | 2156, 2236, |
| Services and charges | 2339 |
| Operational-Fixed Microwave Service, Private | |
| Technical standards | |
| Power and frequency bands, table of | 2308 |
| Practice and Procedure | |
| Common carriers: complaints | |
| Formal or informal | 2126 |
| Hearing proceedings: appeal and reconsideration | |
| Interlocutory ruling, appeal from | 2260, 2256 |
| Information, general | |
| Suspend/amend/waive rules at any time, Commission may | 2120 |
| Proceedings, miscellaneous | |
| Forfeiture proceedings | 2306 |
| Rulemaking proceedings: proceedings | |
| Comments and replies by interested persons | 2116 |
| Decision by Commission | 2156 |
| Notice of Proposed Rulemaking in the Federal Register | 2156 |
| Public Mobile Service | |
| Applications and licenses-filing requirements | |
| Filing, fees and numbers of copies | 2172 |
| Forms and permissive changes or minor modifications | 2306 |
| Forms shared by all domestic public radio services | 2172 |
| Requirements | 2122, 2234 |
| Applications and licenses-processing | |
| Grants by random selection | 2133 |
| Opposition to applications | 2122, 2234 |
| Station authorization, transfer of control/assignment of | 2306 |
| Transfer/assignment of applications, considerations involving | 2122, 2234 |
| Domestic public cellular radio telecommunications service | |
| Applications, amendment of | 2172 |
| Applications, contents and form of | 2172 |
| Financial qualifications | 2122, 2234 |
| Public land mobile service | |
| Frequencies, assignment of | 2304 |

| Subject | Page |
|---|---|
| Special Broadcast Services | |
| Aural broadcast auxiliary stations | |
| Aural broadcast auxiliary stations, classes of | 2202 |
| Licensing requirements | 2202 |
| Services permissible including multiplexing | 2202 |
| FM broadcast translator and booster stations | |
| Services permissible | 2196, 2202 |
| Transmitters and associated equipment | 2196 |

# TABLE OF STATUTORY AND RULE PROVISIONS


| | Page |
|---|---|
| 001.003 Waiver of Rules | 2120 |
| 001.043 Request for Stay, Granted | 2256 |
| 001.080 Forfeiture proceedings | 2306 |
| 001.115 Applications for Review | 2073 |
| 001.277 Exceptions; oral arguments | 2061 |
| 001.301 Appeal | 2256 |
| 001.301 Appeal, Denied | 2260 |
| 001.412 Notice of Proposed Rule Making | 2156 |
| 001.415 Comments and Replies | 2116 |
| 001.425 Commission Action | 2156 |
| 001.711 Formal or informal complaints | 2126 |
| 001.773 Petition to Reject New Tariff Filing | 2314 |
| 001.773 Petitions for suspension or rejection of new tariff | 2240 |
| 002.106 Table of Frequency Allocations | 2212 |
| 021.013(a) Real-party-in-interest rule | 2053 |
| 021.013(g) Management or Operation or Maintenance Agreement | 2053 |
| 021.019 Waiver of rules* | 2053 |
| 021.029 Ownership changes and agreements to amend or dismiss | 2053 |
| 021.901(d)(2) One-to-a-market rule | 2053 |
| 022.0033 Grants by random selection | 2133 |
| 022.006 Filing of Applications, Fees, and Numbers of Copies | 2172 |
| 022.009 Standard application forms | 2306 |
| 022.013 General application requirements | 2122 |
| 022.013 General application requirements | 2234 |
| 022.030 Opposition to applications | 2122 |
| 022.030 Opposition to applications | 2234 |
| 022.039 Transfer of control or assignment of station | 2306 |
| 022.040 Considerations involving transfer or assignment | 2122 |
| 022.040 Considerations involving transfer or assignment | 2234 |
| 022.11 Miscellaneous Forms Shared by All Public Mobile Service | 2172 |
| 022.501 Frequencies | 2304 |
| 022.913 Content and Form of Applications | 2172 |
| 022.917 Demonstration of financial qualifications | 2122 |
| 022.917 Demonstration of financial qualifications | 2234 |
| 022.918 Amendment of cellular applications | 2172 |
| 032.014 Regulated Accounts | 2068 |
| 032.023 Nonregulated activities | 2068 |
| 032.027 Transactions with affiliates | 2068 |
| 047.0000 C.F.R. § 1.46(a) | 2070 |
| 047.0000 C.F.R. § 1.46(a) | 2316 |
| 063.001 Contents of Applications | 2063 |
| 063.001 Contents of Applications | 2149 |
| 063.001 Contents of Applications | 2237 |
| 064.702 Furnishing of Enhanced Services and Customer-Premise | 2182 |
| 064.901 Allocation of Costs | 2068 |
| 069.0000 Access Charges | 2120 |
| 069.0000 Access Charges | 2241 |
| 069.003 Filing of access service tariffs | 2043 |
| 069.205 Transitional Premium Charges | 2311 |
| 069.206 Transitional Non-Premium Charges for MTS-WATS equiv. | 2311 |

073.1910 Fairness Doctrine ..... 2035
073.1910 Fairness Doctrine ..... 2050
073.202 FM Table of Allotments ..... 2136
073.202 FM Table of Allotments ..... 2137
073.202 FM Table of Allotments ..... 2138
073.202 FM Table of Allotments ..... 2140
073.202 FM Table of Allotments ..... 2141
073.202 FM Table of Allotments ..... 2179
073.202 FM Table of Allotments ..... 2180
073.202 FM Table of Allotments ..... 2183
073.202 FM Table of Allotments ..... 2184
073.202 FM Table of Allotments ..... 2185
073.202 FM Table of Allotments ..... 2187
073.202 FM Table of Allotments ..... 2189
073.202 FM Table of Allotments ..... 2191
073.202 FM Table of Allotments ..... 2192
073.202 FM Table of Allotments ..... 2195
073.202 FM Table of Allotments ..... 2206
073.202 FM Table of Allotments ..... 2210
073.202 FM Table of Allotments ..... 2213
073.202 FM Table of Allotments ..... 2215
073.202 FM Table of Allotments ..... 2225
073.202 FM Table of Allotments ..... 2226
073.202 FM Table of Allotments ..... 2229
073.202 FM Table of Allotments ..... 2250
073.202 FM Table of Allotments ..... 2252
073.202 FM Table of Allotments ..... 2258
073.202 FM Table of Allotments ..... 2261
073.202 FM Table of Allotments ..... 2262
073.202 FM Table of Allotments ..... 2264
073.202 FM Table of Allotments ..... 2265
073.202 FM Table of Allotments ..... 2267
073.202 FM Table of Allotments ..... 2268
073.202 FM Table of Allotments ..... 2309
073.202 FM Table of Allotments ..... 2336
073.202, FM Table of Allotments ..... 2219
073.202, FM Table of Allotments ..... 2231
073.202, FM Table of Allotments ..... 2254
073.202, FM Table of Allotments ..... 2266
073.3573(a)(1) processing FM station applications ..... 2192
073.504, Noncommercial Educational FM Table of Allotments ..... 2135
073.606 TV Table of Allotments ..... 2071
073.606 TV Table of Allotments ..... 2263
073.606, TV Table of Allotments ..... 2208
074.1231 Purpose and permissible service ..... 2196
074.1231 Purpose and permissible service ..... 2202
074.1250 Transmitter and associated equipment ..... 2196
074.501 Classes of aural broadcast service ..... 2202
074.531 Permissible service ..... 2202
074.532 Licensing requirements ..... 2202
094.073 Power limitations. ..... 2308
097.001 Basis and purpose ..... 2076
097.113 Broadcasting and broadcast related activities prohi. ..... 2069
300.154 Equal Access Requirements for ITCs ..... 2154

300.201 Services and Charges ..... 2339
300.204 Hearing As To Lawfulness of New Charges;Suspension ..... 2043
300.204 Hearing as to Lawfulness of New Charges, Suspension ..... 2241
300.205 Comm'n authorized to prescribe just & reas. charges ..... 2339
300.208 Complaints to the Commission ..... 2239
300.214 Extension of Lines ..... 2063
300.214 Extension of Lines ..... 2064
300.214 Extension of Lines ..... 2156
300.214 Extension of Lines ..... 2236
300.214 Extension of Lines ..... 2237
300.220 Accounts, Records, and Memoranda; Depreciation Charg ..... 2068
300.319 Construction Permits ..... 2064
300.403 Inquiry by Commission on its own Motion ..... 2339
300.415 Limitations As To Actions ..... 2126
500.005 Integration of ownership into management, qualitativ ..... 2243
500.010 Integration of ownership (qualitative), broadcast ex ..... 2243
500.015 Integration of ownership (qualitative), civic partic ..... 2243
500.020 Integration of ownership (qualitative), female owner ..... 2243
500.025 Integration of ownership (qualitative), local reside ..... 2243
500.030 Integration of ownership (qualitative), minority own ..... 2243
500.035 Integration, Quantitative ..... 2270
500.035 Integration of ownership into management, quantitati ..... 2243
500.045 Diversification, Quantitative ..... 2270
500.045 diversification of control of mass media ..... 2243
500.065 comparative coverage ..... 2243
500.112 Air Hazard ..... 2152
500.118 Environmental Impact ..... 2152
500.125 Misrepresentation ..... 2270
500.125 misrepresentation and lack of candor ..... 2243
500.135 real party in interest ..... 2243
500.140 Comparative ..... 2152
500.140 Comparative ..... 2176
500.145 Air Hazard ..... 2302
500.150 Ultimate ..... 2152
500.150 Ultimate ..... 2176
500.170 Financial Qualifications ..... 2270
500.170 Financial Qualifications ..... 2233
500.170 Financial qualifications ..... 2243
500.3035 integration of ownership and management, quantitati ..... 2073
500.3215 constitutional issue ..... 2035
73.202, FM Table of Allotments ..... 2139
73.202, FM Table of Allotments ..... 2221
73.202, FM Table of Allotments ..... 2223
Antenna Performance Standards ..... 2062
Assignment app. Hudson Valley to Arch Capitol granted CCB ..... 2119
Computer III Requirements ..... 2242
Contents of Applications, Sec. 63.01, 47 C.F.R. § 63.01 ..... 2317
Extension of Lines ..... 2149
Facilities for Provision of Cable, Sec. 63.54, 47 C.F.R. ..... 2317
General Franchise Requirements, 47 U.S.C. § 541 ..... 2317
NPRM, FM B/C STAS. (Sioux Center, IA, Sioux Falls, SD), ..... 2252
NPRM, FM B/C STAS. (Summerville, SC), DA 88-484 ..... 2189
Ownership Restrictions, 47 U.S.C. § 533 ..... 2317
Part 90, Private Land Mobile Radio Services ..... 2113

Waivers, Section 63.56, 47 C.F.R. § 63.56 ..... 2317
(Bayboro Broadcasting)(Bayboro, North Carolina) ..... 2150
(Faith Broadcasting, Inc.)(Minot, North Dakota) ..... 2178
(Janice Faye Surber)(Jellico, Tennessee) ..... 2177
(LA Crescent Community Broadcasters)(La Crescent, Minnesota) ..... 2332
(Radio Indio Corporation)(Indio, California) ..... 2147
(Ying Hua Benns)(Greenfield, California) ..... 2143

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Complaint of

SYRACUSE PEACE COUNCIL

against

TELEVISION STATION WTVH
Syracuse, New York

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 24, 1988; Released: April 7, 1988**

By the Commission:

1. On August 4, 1987, the Commission responded to the remand decision of the United States Court of Appeals in *Meredith Corp. v. FCC* [1] by concluding that the fairness doctrine, on its face, violated the first amendment and contravened the public interest.[2] Accordingly, the Commission vacated its earlier order, [3] in which it had determined that Meredith Corporation, licensee of television station WTVH in Syracuse, New York, had violated the fairness doctrine, and terminated the proceeding.

2. Now before the Commission are: (1) a Petition for Reconsideration of Geller and Lampert filed September 1, 1987, by Henry Geller and Donna Lampert (Geller and Lampert); (2) a Petition of Freedom of Expression Foundation for Partial Reconsideration of Order filed September 3, 1987, by Freedom of Expression Foundation, Inc. (FEF); (3) a Partial Opposition to Petition for Reconsideration of Geller and Lampert filed September 11, 1987, by Telecommunications Research and Action Center (TRAC) and Syracuse Peace Council (SPC); (4) an Opposition of Meredith Corporation to Petition for Reconsideration of Geller and Lampert filed September 16, 1987, by Meredith Corporation (Meredith); (5) an Opposition to Petition for Reconsideration of Geller and Lampert filed September 16, 1987, by the Radio-Television News Directors Association (RTNDA); (6) an Opposition of People for the American Way to Petition of Freedom of Expression Foundation for Partial Reconsideration of Order filed September 16, 1987, by People for the American Way (PFAW); (7) an Opposition of CBS Inc. to Petition for Reconsideration of Geller and Lampert filed October 23, 1987, by CBS Inc. (CBS); (8) an Opposition to Petitions for Reconsideration and Clarification filed October 26, 1987, by the Office of Communication of the United Church of Christ and the Communications Commission of the National Council of Churches (UCC); and (9) a Reply of Geller and Lampert to Oppositions filed November 9, 1987, by Geller and Lampert. These pleadings relate to the Commission's August memorandum opinion and order in this proceeding.[4]

## I. BACKGROUND

3. In 1984, the Commission determined that television station WTVH had violated the fairness doctrine by broadcasting a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York without providing a reasonable opportunity for the presentation of contrasting viewpoints on that issue.[5] The Commission denied reconsideration of that determination, despite Meredith's assertion, among others, that enforcement of the doctrine -- on its face, and as applied in this case -- violated the first amendment.[6] Instead, the Commission concluded that Meredith's constitutional arguments were more appropriately considered by the courts or Congress, and, therefore, it declined to rule on them.[7]

4. On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case, concluding that the Commission's failure to address Meredith's constitutional arguments was "the very paradigm of arbitrary and capricious administrative action."[8] Noting that another panel of that court had determined that the fairness doctrine was not codified in the Communications Act,[9] or otherwise mandated by congressional action,[10] the court held that the Commision was not free "to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward."[11] It therefore remanded this case with instructions to consider Meredith's constitutional arguments, unless, in the alternative, the Commission determined that continued enforcement of the fairness doctrine was no longer in the public interest.[12]

5. In its August 1987 decision on remand, the Commission held that, "under the constitutional standard established by *Red Lion [Broadcasting Co. v. FCC* [13]] and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest."[14] Because the policy and constitutional considerations in the case were inextricably interwined, the Commission determined that it could not address the constitutional issues separately from the policy issues.[15] It also decided to consider the constitutionality of the doctrine "on its face," because there was no sound, justifiable basis for limiting its decision to the constitutionality of the doctrine "as applied" in this case.[16] Finally, the Commission determined that it could reach the issue of the doctrine's constitutionality in this adjudicatory proceeding and was not obligated to institute a Rule Making proceeding in order to address the court's instructions on remand.[17]

6. Addressing the merits of Meredith's constitutional arguments, the Commission determined that the fairness doctrine was unconstitutional under the first amendment standard established by *Red Lion* and its progeny. More specifically, the Commission held that, because of the identified chilling effect caused by the doctrine's enforcement,[18] "the overall net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*. "[19] The Commission relied on the Supreme Court's statement in *Red Lion* that it would reconsider its holding that the fairness doctrine was constitutional "if experience with the administration of [the doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."[20] Furthermore, the Commission concluded that "[b]ecause the fairness doctrine imposes substantial burdens upon the editorial discretion of broadcast

journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in [ *FCC v.* ] *League of Women Voters.* "[21] Consequently, the Commission granted reconsideration and vacated its earlier order determining that Meredith had violated the fairness doctrine.[22]

## II. THE FREEDOM OF EXPRESSION FOUNDATION PETITION

7. In its petition, FEF asks the Commission to reconsider footnote 75 of the August order, in which the Commission noted, "[W]e need not -- and do not -- decide here what effect today's ruling will have on every conceivable application of the fairness doctrine."[23] FEF argues that the Commission, in this proceeding, should specifically determine that continued enforcement of the personal attack rule[24] and the political editorial rule,[25] which FEF characterize as "direct progeny of the fairness doctrine," also violates the first amendment.

8. We deny the FEF petition to the extent that it requests us to consider the continued validity of the personal attack and political editorial rules in this proceeding. Because this adjudicatory proceeding did not involve the application of either of those rules, we do not believe, as FEF asserts, that it is arbitrary and capricious for us to decline to address them here. Those issues are beyond the scope of this proceeding. We note that after the release of the August order, the Commission received a Joint Petition for Expedited Rule Making Action and for Clarification of Memorandum Opinion and Order Ending Enforcement of the Fairness Doctrine filed August 25, 1987, by the Radio-Television News Directors Association and others. This petition requests the Commission either to conclude the Rule Making proceeding currently outstanding with respect to the personal attack and political editorial rules[26] or to clarify the August order, concluding that those rules will no longer be applied to radio and television licensees. On September 23, 1987, the Commission released a public notice inviting public comment on this petition, and the matter is now pending before the agency. We believe that FEF's arguments are appropriately considered separately and not in the proceeding now before us. We therefore refer FEF's petition to that separate proceeding.[27]

## III. THE GELLER AND LAMPERT PETITION

### A. Introduction and Summary

9. Geller and Lampert urge us to reconsider our August order on several grounds. First, they argue that the Commission erred in abandoning the fairness doctrine, because, they contend, the enforcement of the doctrine is mandated by the Communications Act. Second, they argue that the Commission erred in determining not to enforce the fairness doctrine without first considering and then adopting an alternative means of enforcing the doctrine. Specifically, they urge the Commission to adopt their proposed alternative of implementing a malice test in the contemporaneous, case-by-case enforcement of the doctrine.[28] Geller and Lampert assert that this approach presents a means of enforcing the doctrine that is less intrusive than the Commission's previous method. Finally, Geller and Lampert argue that the Commission erred in eliminating its enforcement of the first prong of the fairness doctrine[29] and that, in fact, the Commission should increase its enforcement of the first prong in conjunction with its enforcement of the malice alternative.

10. Several parties support the Geller and Lampert petition,[30] although TRAC, SPC and UCC oppose the malice approach proposed by Geller and Lampert as an inadequate alternative to the previous enforcement of the fairness doctrine. Instead, they argue that the Commission should reinstate the fairness doctrine as previously enforced. Otherwise, these parties fully support the Geller and Lampert petition.

11. In opposition to the Geller and Lampert petition, Meredith Corporation, RTNDA and CBS urge us to deny reconsideration of the August order. Specifically, RTNDA argues that the Court of Appeals decision in *Telecommunications Research and Action Committee v. FCC* [31] definitively held that the fairness doctrine is not codified in the Communications Act and that the court's decision in *Meredith* held that the FCC could not avoid Meredith's challenge by concluding that the doctrine was codified. RTNDA also asserts that the Commission did, in fact, consider alternatives to the fairness doctrine and concluded that no alternative was satisfactory. Together with CBS, RTNDA argues that the malice alternative proposed by Geller and Lampert would be unworkable in any event and would still have an unconstitutional chilling effect on broadcasters' coverage of controversial issues of public importance. Finally, RTNDA asserts that the Commission correctly eliminated its enforcement of both prongs of the fairness doctrine, because the first prong was inseverable from the second. Furthermore, it argues that, because of the first prong's substantial intrusiveness into the editorial process, should not be enforced as a separate policy matter.

12. After fully considering the comments of the parties, we deny the Geller and Lampert petition for reconsideration. We maintain our conclusion that, in light of the *TRAC* and *Meredith* decisions, the fairness doctrine is not mandated by the Communications Act and that the Commission was obligated to consider and to rule on Meredith's constitutional arguments in its defense. Furthermore, because the doctrine was not codified, we were under no legal obligation to consider or to adopt alternatives to the doctrine before ruling on Meredith's claim that the doctrine was unconstitutional as then administered. In any event, in a separate proceeding,[32] we considered and rejected, as constitutionally unsound and contrary to the public interest, alternatives to the doctrine, and we now specifically reject, as constitutionally unsound and contrary to the public interest, the contemporaneous, case-by-case malice approach proposed by Geller and Lampert. Finally, we remain convinced that the fairness doctrine was an inseparable doctrine and that, as such, one component could not be severed from the other without undermining the underlying essence of the doctrine.

### B. Codification of the Fairness Doctrine

13. Despite petitioners' assertions to the contrary, the Court of Appeals decision in *TRAC* held that the fairness doctrine is not codified in the Communications Act.[33] Consequently, we reject their argument that our August decision was in error because it eliminated a policy codified in the Act. We also deny petitioners' contention that,

because (in their view) the fairness doctrine cannot be logically separated from Sections 312(a)(7) and 315 of the Act,[34] our ruling called into question the constitutionality of those sections. We reject, as well, their argument that the doctrine cannot be eliminated without eviscerating our general public interest mandate under the statute. Instead, we emphasize that our action leaves Sections 312(a)(7) and 315, as well as the Act's public interest mandate, intact.

14. The *TRAC* court itself drew the distinction between the fairness doctrine and Sections 312(a)(7) and 315 and upheld our public interest determination not to apply the fairness doctrine to teletext.[35] Likewise, because we determined in this proceeding that the doctrine violated the first amendment, its elimination was, *a fortiori*, consistent with, not violative of, our public interest mandate.[36] We believe that elimination of the fairness doctrine will serve the public interest, and we reject petitioners' argument that its elimination vitiates, from a statutory perspective, the Act's public interest mandate. As we stated in our August order, "The Commission may still impose certain conditions on licensees in furtherance of [the Act's] public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act."[37] Our August order appropriately considered the continued validity of the fairness doctrine alone and in no way was meant to pass on the constitutionality specifically of Sections 312(a)(7) and 315,[38] or on the constitutionality generally of the Act's public interest mandate.

**C. Consideration of Alternatives to the Fairness Doctrine**

15. In the same vein, we also reject petitioners' claim that we were legally obligated to consider and to adopt an alternative means of enforcing the fairness doctrine before eliminating the doctrine altogether in the August order. This claim is premised on petitioners' argument that the doctrine is codified in the Communications Act, an argument that we have rejected for the reasons set forth above. Had the doctrine in fact been codified in the Act, we believe that Geller and Lampert would have been correct in asserting that we would have had the legal obligation to construe the doctrine so as to achieve the least restrictive encroachment on broadcasters' first amendment rights consistent with the statutory mandate.[39] We know of no precedent, however, that would require us, in the context of an enforcement proceeding in which a constitutional challenge to our own policy is made, to consider and to adopt an alternative to that policy before concluding that the challenge has merit. In its petition for reconsideration of our 1984 order, Meredith challenged the constitutionality of the fairness doctrine as then administered.[40] Likewise, the Court of Appeals in remanding this case directed the Commission to consider Meredith's challenge, without requiring any additional consideration of alternatives.[41] In our August order, we simply ruled that the fairness doctrine, as then administered, was unconstitutional and contrary to the public interest. In the context of this enforcement proceeding, we were obligated to go no further.

16. Notwithstanding the above, however, we did in fact consider alternative means of enforcing the fairness doctrine in our separate *Fairness Alternatives Report* to Congress.[42] Among the alternatives considered in that proceeding was a proposal by Geller and Lampert that we entertain fairness doctrine complaints only at renewal time and that we apply a "malice" standard of review to those complaints.[43] Although we agreed with commenters in that proceeding that certain alternatives were "preferable to our current administration and enforcement of the doctrine . . . (*e.g.*, applying a malice' standard of review to fairness complaints . . .)," we nevertheless concluded that none of these alternatives was entirely satisfactory from a constitutional or policy perspective.[44] The Commission concluded, therefore, that "the best alternative to the doctrine and the one that best achieves the First Amendment principles underlying the doctrine, and, consequently, our public interest objectives, would be an unregulated marketplace of ideas."[45] As a result, we declined to recommend to Congress any of the proposed alternatives to the doctrine.[46]

17. Geller and Lampert now propose an alternative that differs from their prior proposal, which we already rejected in the *Fairness Alternatives Report*, only insofar as it seeks to have a malice standard applied in the context of contemporaneous fairness complaints, rather than at renewal time.

18. In opposition to Geller and Lampert's latest proposal, CBS questions how the malice approach on a contemporaneous basis would differ from our prior approach of deferring to broadcasters' reasonable judgments on a case-by-case basis. CBS argues that the malice standard only has meaning if applied at renewal time, after the licensee has established a record of conduct over a period of time to determine whether there has been a pattern of abuse. Determining malice under a case-by-case approach, according to CBS, would be no different from our previous approach of finding licensees in violation of the doctrine only if they had unreasonably exercised their editorial judgment in the matter. In reply, Geller and Lampert assert that their contemporaneous malice approach would be similar to the Commission's current approach in evaluating news distortion cases. This approach would require the introduction of extrinsic evidence that the licensee deliberately violated the doctrine or acted in reckless disregard for the doctrine's requirements. Moreover, the malice standard would take on more meaning over time if there developed a series of fairness violations against a licensee.

19. We reject this alternative as well, because it fails to achieve "the First Amendment principles underlying the doctrine."[47] We are not convinced that Geller and Lampert's proposal is substantially different from their renewal-only approach or from the Commission's previous practice of deferring to licensees' reasonable judgments so as to warrant reconsideration of any of the conclusions reached in either the *Fairness Alternatives Report* or our August order in this proceeding. In the *Fairness Alternatives Report*, we concluded only that a malice standard might *reduce* the government intrusion into the editorial process associated with the fairness doctrine as administered at that time.[48] We did not conclude, however, that such an approach would reduce government intrusion to the extent necessary to eliminate the chilling effect of the doctrine that rendered it unconstitutional under the *Red Lion* standard. Nor are we convinced by petitioners' assertions that this approach would remedy the constitutional deficiencies identified with the fairness doctrine in our *1985 Fairness Report* [49] and our August order.[50] CBS and

RTNDA agree that, although Geller and Lampert's approach would reduce the chilling effects associated with the doctrine, it would still not eliminate them.

20. As stated above, we need not decide here the full extent of any chilling effect resulting from petitioner's latest proposal in order to reaffirm our conclusions in the August order. Nor need we resolve that point in order to decide that petitioners' proposal would not be narrowly tailored to achieve a substantial governmental interest.[51] A crucial holding of our August order was that the threat of government intrusion into broadcasters' editorial decisions resulted in a chilling effect, thereby rendering the fairness doctrine unconstitutional and contrary to the public interest.[52] This effect resulted as much from broadcasters' perception of the doctrine as from the actual implementation of the doctrine.[53] Petitioners' proposal of a malice standard attempts to reduce the level of governmental intrusion, but petitioners have not presented any additional evidence that would permit us to conclude that their most recent variation of the malice standard would sufficiently lessen the chilling effect on broadcasters to warrant a different conclusion with respect to this basic approach. The difference in its impact on licensees is a matter of degree rather than of kind. Accordingly, we believe that adoption of petitioners' proposal would be inappropriate.[54]

21. Moreover, our August order also held that the existing multiplicity of broadcast outlets allows us to achieve the fairness doctrine's goal of diversity of viewpoints without government intervention.[55] No variation on the fairness doctrine, therefore, is needed to achieve the goal of diversity. Consequently, this latest proposal does not satisfy our constitutional or policy concerns with the doctrine. We reaffirm our earlier conclusion, expressed both in our August order and in the *Fairness Alternatives Report*, that the best alternative to any content-based regulation[56] that seeks to provide, consistent with the first amendment, viewers and listeners with diverse viewpoints is one that relies on an unregulated marketplace of ideas.[57]

**D. Elimination and Enforcement of the First Prong**

22. Finally, Geller and Lampert request us to reconsider our decision to discontinue enforcement of the first prong of the fairness doctrine, under which broadcasters were obligated to address vitally important controversial issues. They argue that our August order eliminated that prong without adequate notice and that our reasons for eliminating the requirement are deficient. They contend that, like their contemporaneous malice approach, increased enforcement of the prong is mandated by the Communications Act. We deny petitioners' request.

23. At the outset, it should be noted that the Commission, in the August order, did not hold that the first prong of the fairness doctrine, standing alone, was unconstitutional. Rather, the Commission set forth two reasons why it would no longer enforce the first prong. First, the Commission stated that, because "both parts of the doctrine are interdependent and integral to the overall regulatory scheme [of fairness],"[58] it would not sever the first part of the doctrine and consider only whether to continue enforcement of the second part.[59] Instead, it determined that if the enforcement of the doctrine was unconstitutional, it would discontinue enforcement of the entire doctrine, because the elimination of either part would essentially make the doctrine, as it had developed over the years, a nullity.[60] That is, while the first part of the doctrine might conceivably be enforced as an independent policy matter, it simply would not then be the "fairness doctrine," but a new programming requirement devoid of the essential "fairness" component of the old policy. Analogizing to applicable law regarding the severability of statutes, the Commission concluded that, because of the first prong's interrelation with the second, the first prong fell, as part and parcel of the entire doctrine, once the second prong was determined to be unconstitutional.[61] This result followed regardless of whether the first prong could be lawfully enforced as a separate policy matter.

24. Second, we determined that, even if the two parts of the doctrine were severable, we would not choose, as a policy matter, to enforce such a revised first prong divorced from the second prong. We stated that, because enforcement of the first prong alone in this fashion would be largely duplicative of our existing enforcement of the requirement that broadcasters cover issues that are responsive to the needs and interests of their communities,[62] there would be no added public interest benefit to enforcing the first prong of the fairness doctrine as an independent policy.[63]

25. Petitioners do not directly dispute our holding that the two-part obligation imposed by the fairness doctrine is inseverable insofar as the two parts are necessary to give identity to the overall fairness obligation. They therefore have provided us with no basis for reconsidering our August determination that the two prongs of the doctrine are integral to the entire regulatory scheme of fairness and therefore should not be severed in this proceeding. Indeed, inasmuch as the doctrine, as a unified whole, was intended to provide a mechanism for governmental oversight of the "fairness," or balance, of broadcasters' coverage of certain controversial issues, the analysis in our August order applies to the first part of the fairness obligation, as well as to the second. Although differing in the scope of its coverage, the first portion of the doctrine was intended to function, in part, as a backstopping mechanism to preclude licensees from avoiding the requirement of balanced coverage by withdrawing from coverage altogether. Conversely, the second part operated in tandem with the first, insofar as it was perceived as undesirable to credit a licensee for coverage of an issue solely from a particular point of view rather than from a "balanced" perspective. In these respects, the doctrine as a whole was properly the subject of our August ruling.[64]

26. Notwithstanding this analysis, Geller and Lampert contend that our decision no longer to mandate that broadcasters present contrasting viewpoints on controversial issues of public importance (the second prong) does not justify, as a policy matter, a conclusion that broadcasters no longer be required to cover such issues at all (the first prong). To the extent that petitioners argue that we should enforce the first prong by itself more vigorously, we have already addressed that alternative as unsatisfactory.[65] More fundamentally, however, petitioners either misunderstand or simply disagree with our conclusion that, in today's competitive marketplace, discontinued enforcement of the fairness doctrine will promote broadcasters' coverage of controversial issues of public importance. Having eliminated the chilling effects most directly associated with the second prong of the doctrine, coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong. The solution to promoting increased coverage of con-

troversial issues, therefore, lies not with increased enforcement of the first prong obligation, but with elimination of the doctrine altogether.[66]

27. Finally, Geller and Lampert argue that we erred in concluding that the first part should not be severed and enforced separately because of its relationship to the existing issue responsive obligation already imposed on broadcasters. They also assert that, by eliminating the first prong obligation in our August order, we have called into question the continued validity of the issue responsive obligation. We reject both of these contentions. Initially, we note that, although the first part of the fairness doctrine may overlap with other regulatory requirements developed in other contexts, including the issue responsive programming obligation, we did not intend to suggest that the first part obligation under the fairness doctrine and the duty to air issue responsive programming are identical.[67] Thus, petitioners' view that, by eliminating the first prong of the doctrine, the Commission has effectively declared unconstitutional its policy requiring broadcasters to provide programming responsive to the needs and interests of their communities is incorrect. Indeed, the Commission explicitly noted in its decision that the constitutionality of the issue responsive obligation was not at issue in this case.[68] Issue responsive obligations remain in full force and effect, and to the extent that petitioners fear that licensees will no longer cover issues of interest to their communities, we believe that the continued existence of the issue responsive obligation should alleviate that fear. To the extent that petitioners fear that licensees will not cover *controversial* issues, we simply reiterate our conclusion that elimination of the chilling effects of the fairness doctrine should alleviate that fear as well.

## IV. CONCLUSION

28. There is no question that our August order, by eliminating a policy that had been in effect for over three decades, has troubled those who have favored this obligation previously imposed on broadcast licensees. Nevertheless, our obligation under the Communications Act and the Constitution, as amplified by the Court of Appeals in its decision in *Meredith*, required us to evaluate a challenge to a 38-year old policy in the context of a markedly different setting from the one in which it was developed. In today's information marketplace, the fairness doctrine's excessive government intervention in the editorial process, and its documented chilling effect on constitutionally protected speech, compel us to conclude that it is no longer constitutional or in the public interest. As demonstrated by our August order, we do not undertake this determination lightly, but neither will we avoid reaching this compelling conclusion.

29. The public's interest -- and indeed its first amendment right -- to a free and robust exchange of ideas, unencumbered by government intervention, will be better served by the elimination of an outdated policy whose very purpose was thwarted in its practical effect. We support the laudable goal of fairness in the coverage of controversial issues of public importance by broadcast licensees; we reaffirm, however, our conclusion that the government's attempt to mandate this goal through the enforcement of the fairness doctrine is unconstitutional and contrary to the public interest.

30. ACCORDINGLY, IT IS ORDERED that the Petition of Freedom of Expression Foundation for Partial Reconsideration of Order IS DENIED to the extent indicated herein and IS REFERRED, together with the corresponding oppositions filed thereto, for consideration in connection with the separate proceeding regarding the personal attack and political editorial rules.

31. IT IS FURTHER ORDERED that the Petition for Reconsideration of Geller and Lampert IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] 809 F.2d 863 (D.C. Cir. 1987).

[2] *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987). The fairness doctrine imposed a two-part obligation on broadcast licensees. First, it affirmatively required broadcasters to cover vitally important controversial issues of interest in their communities. Second, it obligated them to provide a reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue of public importance that they, in fact, covered. *Id.* at 5058-59 n.2.

[3] *Syracuse Peace Council*, 99 FCC 2d 1389 (1984), recon. denied, 59 RR 2d 179 (1985).

[4] The Commission invited public comment on the Geller and Lampert and the FEF petitions. 52 Fed. Reg. 36,630 (Sept. 30, 1987).

[5] *Syracuse Peace Council*, 99 FCC 2d 1389 (1984), recon. denied, 59 RR 2d 179 (1985), remanded sub nom., *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

[6] *Syracuse Peace Council*, 59 RR 2d 179 (1985). Because facts later presented to the Commission showed that Meredith had subsequently broadcast contrasting viewpoints on the relevant issue, the Commission determined not to impose any sanction on Meredith. *Id.* at 184-85. The Commission, however, refused to vacate its original order finding a fairness doctrine violation, because its finding of a violation had been correct at the time, based on the evidence then before it.

[7] *Id.* at 182 n.4.

[8] *Meredith Corp. v. FCC*, 809 F.2d at 874.

[9] *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 3196 (1987).

[10] *Meredith Corp. v. FCC*, 809 F.2d at 873 n.11.

[11] *Id.* at 874.

[12] *Id.*

[13] 395 U.S. 367 (1969).

[14] *Syracuse Peace Council*, 2 FCC Rcd at 5052 ¶ 61.

[15] *Id.* at 5045-46 ¶¶ 17-22.

[16] *Id.* at 5047-48 ¶¶ 27-35.

[17] *Id.* at 5046-47 ¶¶ 23-26.

[18] *See id.* at 5049-50 ¶¶ 42-51; see also *Inquiry Into Section 73. 1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143, 169-90 (1985) [hereinafter cited as *1985 Fairness Report*].

[19] *Syracuse Peace Council*, 2 FCC Rcd at 5050 ¶ 51.

[20] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391; see also *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 n.12 (1984).

[21] *Syracuse Peace Council*, 2 FCC Rcd at 5052 ¶ 60, *citing FCC v. League of Women Voters of California*, 468 U.S. at 380 (regulations of broadcast speech must be "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues).

[22] In *dictum* to the decision, the Commission urged the Supreme Court to revisit and to revise the current first amendment approach to evaluating content regulations of broadcast speech under *Red Lion*. *Syracuse Peace Council*, 2 FCC Rcd at 5052-57 ¶¶ 62-97. The Commission advocated the application of traditional first amendment principles in the evaluation of such speech regulations. *Id.* Petitioners do not request reconsideration of this portion of the Commission's decision.

[23] *Id.* at 5063 n.75.

[24] 47 C.F.R. § 73.1920.

[25] 47 C.F.R. § 73.1930.

[26] *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28,295 (June 21, 1983).

[27] To the extent that the pleadings of PFAW and UCC raise issues that are relevant to our August order, we will consider those issues here. Otherwise, we will consider PFAW's arguments regarding FEF's petition for partial reconsideration, and UCC's arguments regarding the RTNDA petition on the personal attack and poltical editorial rules, in connection with the separate proceeding discussed above.

[28] According to Geller and Lampert, under a malice test, the Commission would find a violation of the fairness doctrine only if it determined that a licensee acted in deliberate violation of the doctrine, thereby exhibiting bad faith, or that the licensee demonstrated a pattern of acting in reckless disregard for the doctrine's requirements.

[29] *See supra* note 2.

[30] Generally, these supporters are TRAC, SPC, PFAW and UCC.

[31] 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 3196 (1987).

[32] *Inquiry into Section 73. 1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 5272 (1987) [hereinafter cited as *Fairness Alternatives Report* ].

[33] Geller and Lampert argue that this Commission should not treat the court's ruling in *TRAC* as dispositive of this issue because the petition for rehearing in that case was denied by a 5-4 vote in favor of granting it, with two judges abstaining. At the same time, petitioners argue that the Supreme Court's denial of certiorari in that case provides no guidance as to the substantive merits of the Court of Appeals decision. Petitioners cannot have it both ways. They cannot argue that a procedural vote of the D.C. Circuit on rehearing has substantive implications for the merits of a panel decision, while also arguing that a procedural vote of the Supreme Court on certiorari does not. Rather, we believe that neither procedural vote has substantive implications for the panel decision in *TRAC*. Consequently, unless either the D.C. Circuit, en banc, or the Supreme Court effectively overrules *TRAC*, we are bound by its holding.

[34] 47 U.S.C. §§ 312(a)(7), 315.

[35] *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 3196 (1987). The *TRAC* court treated the obligations imposed under Sections 312(a)(7) and 315 and those imposed by the fairness doctrine as distinct. The court reversed the Commission's determination not to require licensees, in the provision of teletext services, to comply with equal opportunity obligations imposed under Section 315 on the grounds that the statute affirmatively mandated such obligations. On the other hand, it affirmed the Commission's interpretation that the reasonable access provision of Section 312(a)(7) did not obligate licensees to offer candidates access to teletext services. Most importantly, the court upheld the Commission's determination not to require licensees to comply with fairness obligations in the provision of teletext services as a reasonable application of the Commission's own policy in futherance of the public interest. *Id.*

[36] *See infra* note 57.

[37] *Syracuse Peace Council*, 2 FCC Rcd at 5055 ¶ 81.

[38] Petitioners claim that our decision is inconsistent with the Supreme Court's ruling in *Red Lion*, which specifically upheld the constitutionality of the fairness doctrine, and with the Court of Appeals' decision in *Branch v. FCC*, 824 F.2d 37 (1987), cert. denied, 56 U.S.L.W. 3642 (U.S. 1988), which upheld the constitutionality of Section 315 on the basis of *Red Lion*. They argue that, unless the Supreme Court reverses its holding in *Red Lion*, we must defer, as did the *Branch* court, to the Court's ruling on the doctrine's constitutionality. Although we addressed similar arguments in the August order, *Syracuse Peace Council*, 2 FCC Rcd at 5065 n.104, we repeat here that we reviewed the constitutionality of the fairness doctrine in the context of a factual record developed for that purpose and found it unconstitutional within the confines of *Red Lion*. *Id.* at 5049-52 ¶¶ 36-61. Our action was not inconsistent with the *Branch* court's deference to *Red Lion* in upholding the constitutionality of Section 315. Unlike the Commission's review of the constitutionality of the fairness doctrine, the Court of Appeals in *Branch* did not review the constitutionality of Section 315 in the context of an evidentiary record developed for that purpose. Absent a record regarding Section 315, the Court of Appeals appropriately upheld the statute's constitutionality on the basis of *Red Lion*. Moreover, we were specifically directed by the Court of Appeals in *Meredith* to consider the constitutional arguments raised by Meredith, unless we were able to conclude, on policy grounds alone, that the fairness doctrine no longer served the public interest. *Meredith Corp. v. FCC*, 809 F.2d at 874. Finally, unlike our review here, which involved an agency-created policy, the *Branch* case involved an express statutory requirement.

[39] Although the Commission may not have the authority to declare an act of Congress unconstitutional, and therefore refuse to enforce it, *see Meredith Corp. v. FCC*, 809 F.2d at 873 n.11, it has the obligation, no less than courts, to construe its enabling statute in a constitutional manner. Cf. *St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 777, 780 (1981) (courts must construe statute, if possible, to avoid raising doubts of its constitutionality); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (same).

[40] *See* generally "Petition for Reconsideration" dated January 22, 1985, and "Reply to Opposition to Petition for Reconsideration and Supplement" dated April 12, 1985, filed by Meredith Corporation in this proceeding.

[41] *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

[42] *See supra* note 32. In the notice of inquiry that led to the issuance of that report, the Commission stated that "the findings [t]herein may be used in any other pending or new proceeding, as appropriate." *Inquiry into Section 73. 1910 of the Commission's Rules and Regulations Concerning Alternatives to the General* Fairness Doctrine Obligations of Broadcast Licensees, 2 FCC Rcd 1532, 1533 ¶ 9 (1987). We, therefore, believe it appropriate to refer to the *Fairness Alternatives Report* in this proceeding.

[43] *Fairness Alternatives Report*, 2 FCC Rcd at 5276-77 ¶¶ 36-40, 5378 ¶¶ 48-53.

[44] *Id.* at 5295 ¶ 171.

[45] *Id.*

[46] The *Fairness Alternatives Report* was intended to inform Congress of the results of the inquiry into alternative means of administration and enforcement of the doctrine, which Congress directed us to undertake pursuant to Pub. L. No. 99-591, § 101(b), 100 Stat. 3341, 3341-67 (1986). *See also* H.R. Rep. No. 1005, 99th Cong., 2d Sess. (1986).

[47] Fairness Alternatives Report, 2 FCC Rcd at 5295 ¶ 171. We reiterate our earlier determination that, in the context of this proceeding, we were under no legal obligation to consider or to adopt alternative means of administering and enforcing the fairness doctrine. *See supra* ¶ 15. We address the merits of petitioners' latest proposal only to re-emphasize our conclusion in the August order that fairness obligations violate the first amendment and are contrary to the public interest. The problem results not so much from the manner in which our rule is enforced, but from the mere threat that the government might enforce a rule requiring a vague and subjective notion of "fairness." In rejecting this latest proposal by Geller and Lampert on the merits, we do not mean to imply that we are obligated to consider every alternative that petitioners can imagine before we can bring this enforcement proceeding to a conclusion.

[48] *Fairness Alternatives Report*, 2 FCC Rcd at 5298 n.51 (We agree that by adopting an 'actual malice' standard, as suggested by Geller and Lampert, we would reduce to some degree the extent of government oversight in fairness matters and would accord greater journalistic discretion to broadcasters.).

[49] *See supra* note 18.

[50] Petitioners dispute our findings regarding the doctrine's chilling effect, relying on statements made by some broadcasters that their speech is not chilled by the doctrine and on certain congressional findings reported in H.R. Rep. No. 108, 100th Cong., 1st Sess. (1987), and S. Rep. No. 34, 100th Cong., 1st Sess. (1987). At the outset, we note that the reports cited by petitioners were approved as part of a legislative effort that ultimately failed, and we are uncertain as to the appropriate weight to give to them. In any event, we do not believe that the congressional findings undermine our own findings in this proceeding. As stated in August, the fact that *some* broadcasters were not chilled by the fairness doctrine does not disprove our finding that the *overall* effect of the doctrine is a net reduction in the coverage of controversial issues of public importance. *Syracuse Peace Council*, 2 FCC Rcd at 5050 ¶ 51. Nor does the lack of chill for some broadcasters dissipate our concern for those broadcasters who were in fact chilled. Furthermore, the congressional findings to the effect that the doctrine has allowed particular speakers to air their viewpoints directly, *e.g.*, H.R. Rep. No. 108, at 18-19; S. Rep. No. 34, at 27, may demonstrate that, on a number of occasions, the doctrine has resulted in certain *speakers* obtaining direct access to the airwaves, but they do not necessarily prove that the doctrine has increased coverage of controversial issues overall. Those viewpoints may have been covered, in a different manner, through the exercise of broadcasters' editorial judgment, if not through direct expression by particular speakers. We note that the doctrine's primary purpose was not to provide direct access to individuals or groups, but to ideas and diverse viewpoints. *See The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1, 28-31 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 109, 112-14 (1973). Our *1985 Fairness Report* demonstrated that broadcasters may have covered contrasting ideas and viewpoints, but, nevertheless, provided access to individuals or groups in order to avoid entanglements with the government over fairness -- a concern separate from meeting the fairness obligation itself. *See, e.g., 1985 Fairness Report*, 102 FCC 2d at 164-65 n.80. We therefore reaffirm our conclusion in the August order that, so long as there are broadcasters who are indeed chilled by the doctrine, and so long as that chill is not offset by evidence that overall broadcast coverage of controversial issues has materially increased as a result of the doctrine, the doctrine has "the *net effect* of reducing rather than enhancing the volume and quality of coverage" of controversial issues of public importance. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391 (emphasis added); Syracuse Peace Council, 2 FCC Rcd at 5050 ¶ 51. Neither Geller and Lampert nor the congressional reports contain any conclusive evidence that broadcasters have increased their coverage of controversial issues of public importance as a result of the fairness doctrine. Consequently, applying the Red Lion standard, we find the doctrine unconstitutional.

[51] *FCC v. League of Women Voters of California*, 468 U.S. at 380.

[52] *See Syracuse Peace Council*, 2 FCC Rcd at 5056-57 ¶ 93: "The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence of a fairness doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion."

[53] *See, e.g., The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 58 FCC 2d 691, 712 n.22 (It must again be emphasized that the [doctrine's] adverse impact on speech derives not so much from what the Commission actually does than from the licensee's apprehension of what the Commission might do.), 707 ([The problem with the doctrine] is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it.) (Comm'r Robinson, dissenting).

[54] In the broadest sense, our view of the fairness doctrine is predicated on the theory, which is a fundamental predicate of the first amendment, that the free speech values associated with open and robust debate are for the benefit of the public at large (and not just a particular speaker). These values are achieved by providing speakers a firm platform from which to articulate their views, rather than by withdrawing such support by punishing speakers who are thought to have expressed viewpoints inappropriately. The Geller and Lampert alternative ignores this basic thesis. Fundamentally, the practical effect of their alternative is not to support the exercise of those speech rights that are the essence of open debate, but to withdraw in some measure the debate from the court of public opinion and to rechannel it to the court of administrative review.

[55] *Syracuse Peace Council*, 2 FCC Rcd at 5050-52 ¶¶ 52-57.

[56] As noted in the August order, id. at 5070 n.227, the fairness doctrine is clearly a content-based regulation of broadcast speech. Neither that order nor this reconsideration calls into question the constitutionality of our content-neutral, structural regulations designed to promote diversity.

[57] *See* id. at 5052 ¶¶ 58-61; *Fairness Alternatives Report*, 2 FCC Rcd at 5296 ¶¶ 171-73. Petitioners' protests that there must be some type of fairness doctrine to protect the public interest from the private interests of broadcasters simply fail to understand the Commission's determination that the public's interest in diversity of information and viewpoint is promoted *most* when broadcasters are free to cover controversial issues of public importance

without fear of subsequent governmental intervention. *See* also *supra* note 54. Our conclusion that the first amendment compels the elimination of the fairness doctrine means, a *fortiori*, that elimination of the doctrine is in the public interest.

[58] *Syracuse Peace Council*, 2 FCC Rcd at 5048 ¶ 33.

[59] *Id.*

[60] *See* id. at 5048 ¶ 33, 5064 n.99.

[61] Id. at 5065 n.100, citing *EEOC v. All State Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dism'd, 467 U.S. 1232 (1984) (legislative veto not severable from overall statutory scheme and, therefore, entire statute falls).

[62] *See* generally *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984), recon. denied, 104 FCC 2d 358 (1986), remanded on other grounds sub nom., *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977-8 (1981), *recon. denied*, 87 FCC 2d 797 (1981), rev'd on other grounds sub nom., *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 141 (D.C. Cir. 1983) [hereinafter cited as Radio Deregulation].

[63] *Syracuse Peace Council*, 2 FCC Rcd at 5048 ¶ 34.

[64] As such, we believe that parties had adequate notice that the continued validity of the doctrine in its entirety was at stake in this proceeding. Indeed, we note that the Court of Appeals remanded, for our consideration, the continued validity of the doctrine without differentiating between its two parts. Likewise, the Commission's general conclusions in the *1985 Fairness Report* went to the fairness doctrine as a whole. *See 1985 Fairness Report*, 102 FCC 2d at 246-47.

[65] As we stated in our Fairness Alternatives Report, 2 FCC Rcd at 5287-88 ¶¶ 116-20, and our 1985 Fairness Report, 102 FCC 2d at 161 n.66, increased enforcement of the first prong of the doctrine would foster even greater governmental intrusion into the editorial process, requiring the determination of whether broadcasters' judgments as to the need for coverage of particular controversial issues comport with the government's judgments on those matters.

[66] We are not saying that the first prong could never be enforced separately; but if it were to be enforced as an independent policy, it would have to have its basis in an objective other than "fairness." Because the first prong, as it has developed, has been implemented as part of a regulatory scheme attempting to achieve "fairness," we have no basis to conclude here that it may be enforced separately in order to achieve a different goal.

[67] While enforcement of the doctrine's first prong requires the government to judge, on a case-by-case basis, whether a *specific* issue is both controversial and of vital importance to mandate coverage by the broadcaster, enforcement of the issue responsive obligation requires a different level of government intervention in determining, at renewal time, whether broadcaster's *overall* programming covered the needs and interests of its community. *See* , *e.g., Radio Deregulation*, 84 FCC 2d at 983 n.36; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[68] *Syracuse Peace Council*, 2 FCC Rcd at 5065 n.101. The Commission certainly had not developed, as part of the factual record for this proceeding, a record for purposes of reviewing the continued validity of licensees' issue responsive programming obligations.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-1**

In the Matter of

Annual 1988 Access Tariff Filings
Phase I

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 29, 1988; Released: February 29, 1988**

By the Deputy Chief, Common Carrier Bureau:

## I. INTRODUCTION AND BACKGROUND

1. On December 24, 1987, we released an Order initiating an investigation of the annual 1988 access tariff filings of several local exchange carriers (LECs).[1] The *December 24 Order* identified a single issue which warranted suspension of special access rate increases proposed by eight LECs.[2] Our review of the LEC tariff filings and petitions to reject, suspend or investigate those filings "presented numerous instances in which the LECs' allocations of the primary special access cost categories, Cable and Wire Facilities and Central Office Equipment, may have been misallocated or at least present anomalous results in comparison with appropriate demand quantities." *December 24 Order* at para. 52. This discrepancy, which generally occurred because many carriers used historical separations factors to determine revenue requirements, but projected substantial declines in voice-grade special access demand as customers migrated to high capacity facilities, raised substantial concerns that rates might be overstated. "Any misallocation of CWF and COE investment not only directly produces significant revenue requirement distortions, but also produces indirect distortions because many plant and expense overheads are themselves allocated on the basis of CWF and/or the COE allocation in both the Part 36 separations rules and the Part 69 access allocation rules." *Id.* at para. 136.

2. On January 14, 1988 this Bureau issued an Order designating information to be submitted by the LECs and establishing an expedited pleading cycle. [3] This *Designation Order*, directed the LECs to file their direct cases no later than January 25, 1988. If a LEC determined that the methodology that it used to develop the special access revenue requirement in the October 1987 filings was not consistent with the methodology it used to project 1988 demand quantities, such a LEC was instructed to file tariff revisions correcting its rates, supported by the same information required for a direct case.

3. The GTE Operating Companies (GTOC), New York Telephone, and Southern New England Telephone Company filed direct cases defending their methodologies. Reductions to the proposed rates were filed in tariff transmittals by Bell Atlantic, Cincinnati Bell, Ameritech, New England Telephone, and US West (Mountain States Telephone and Northwestern Bell). These reductions totalled about $36 million. Carriers who were not affected by the suspension also filed Phase I direct cases, but this Bureau granted an indefinite delay in the filing of oppositions to those direct cases. This Bureau also granted a one-week delay from the original date for the filing of oppositions and comments regarding direct cases and the new tariff transmittals.[4] Subsequently, this Bureau terminated the suspension of the rates proposed by Southern New England Telephone, concluding that Southern New England had adequately demonstrated in a petition for reconsideration that it did take forecast changes in demand into account in developing its revenue requirement. We also ended the suspension of New York Telephone rates, because an intermediate correction filed by New York Telephone resulted in proposed rates that were lower than the rates that were in effect.[5]

4. Petitions and comments were filed by 8 parties. American Telephone and Telegraph Company (AT&T) contends that the LECs have failed to resolve the serious questions raised as to the lawfulness of the tariffs, but observes that continued suspension would deprive LEC customers of the rate reductions implemented by some of the LECs and changes by others in high capacity rates. AT&T requests suspension of the tariff revisions for one day and imposition of accounting orders pending further investigation. The Ad Hoc Telecommunications Users Committee (Ad Hoc) and Aeronautical Radio, Inc. (ARINC) view the special access rates as neither adequately justified nor rectified and request rejection or further suspension and investigation. Western Union Corporation (Western Union), in the most extensive comments, contends that none of the LECs has sustained its burden of proof,that all of the LECs failed to supply the data required in the *Designation Order*, and all engage in unsupported and unsound methodologies that overallocate investment to special access. Western Union contends that the tariffs must be found unlawful on this record, that all the tariffs (except Mountain Bell's) should be cancelled, and the LECs should be ordered to file new rates to correct overallocations. Alternatively, Western Union requests new or extended suspension of the revised tariffs and imposition of an accounting order. The petitions and the replies of the LECs[6] are summarized in more detail in the Appendix to this Order.

## II. DISCUSSION

5. This phase of the CC Docket 88-1 investigation is narrow in scope. The *December 24 Order* concluded that the 1988 annual access tariffs present a number of questions that warrant investigation, but that most of those questions do not warrant a suspension. We did find that the apparent inconsistencies between methodologies that many LECs used to develop special access revenue requirements and methodologies that those LECs used to develop demand quantities warrant suspension of increases in special access rates proposed by those LECs. We accordingly structured the CC Docket 88-1 investigation to enable us to examine those cost-demand relationships on a more expedited basis. The *Designation Order*, which was issued on January 14, 1988, was intended to invite comment on that subject. Some of the oppositions or petitions filed in response to the direct cases raise questions that do not appear to relate to that question. The Appendix sum-

marizes the portions of the pleadings that are relevant to the cost-demand relationships, but does not summarize pleadings that appear to relate to other questions.

6. Our review of the new transmittals filed by Bell Atlantic, Cincinnati Bell, Ameritech, New England Telephone, Mountain States Telephone and Northwestern Bell and the pleadings relating to those transmittals leads us to conclude that these carriers have achieved as much consistency as the carriers that were not subject to a suspension. We are incorporating those transmittals and those revised rates in the ongoing CC Docket 88-1 investigation. We can consider further refinements in separations methodologies and other unresolved questions that may require changes in these rates in subsequent Docket 88-1 proceedings. We have, however, concluded that these transmittals do not warrant suspension pending such investigation.

7. Some of the comments and petitions request that we suspend the revised rates for one day and impose accounting orders. Although we will include the revised tariff transmittals in this investigation, an accounting order would not be desirable in these circumstances.

8. We are extending the suspension of the GTOC rate increases. The GTOC direct case did not provide a clear explanation of the methodology GTOC used to identify special access costs. The GTOC direct case merely claimed that GTOC's methods were reasonable and in conformity with Commission Rules. Although the GTOC reply did supply additional information, we have not had sufficient time to analyze that information in the brief period since the GTOC reply was filed. Moreover, GTOC's attempt to use its reply as a substitute for a direct case has effectively deprived other parties to the investigation of a meaningful opportunity to comment on GTOC's case. We believe those parties should receive that opportunity before rate increases become effective. Therefore, we are extending the suspension of the GTOC special access rates until April 15, 1988 and are establishing a supplemental pleading schedule.

9. On February 24, 1988, Western Union filed a motion requesting that we establish an additional round of comments to respond to the LEC replies, which in many cases presented additional information and defenses Western Union contends should have been in the direct cases. It also requests that the revised tariffs be suspended and the suspension of the October 2 tariff filings be extended to the maximum period allowed by statute, five months. Motions to strike the motion as unauthorized were filed by Bell Atlantic and US West, and Western Union responded to these motions on February 26, 1988. As we discuss above, we believe this argument is well-taken for GTOC although a full five-month suspension seems unnecessary at this time. For the other filings, Western Union provides no specific details of its claims, and in any case we remain of the view that the filings have improved the tariffs sufficiently by correcting the inconsistent demand methodology, and that the suspensions therefore should be terminated while our investigation proceeds.

## III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that Ameritech Operating Companies Transmittal No. 153, Bell Atlantic Telephone Companies Transmittal No. 231, Cincinnati Bell Telephone Company Transmittal No. 485, New England Telephone & Telegraph Company Transmittal No. 906, and Mountain Bell, Northwestern Bell, Pacific Northwest Bell Transmittal No. 128 ARE PLACED UNDER INVESTIGATION IN CC DOCKET NO. 88-1.

11. IT IS FURTHER ORDERED, that the suspension of the special access rates in GTE Operating Companies Transmittal No. 305 and subsequent revisions is extended until **April 15, 1988.** Supplemental comments regarding this transmittal may be filed no later than **March 10, 1988.** A supplemental reply may be filed no later than **March 17, 1988.**

12. IT IS FURTHER ORDERED, that the GTE Operating Companies shall issue a supplement no later than March 4, 1988, indicating that the proposed special access rates ARE FURTHER SUSPENDED.

13. IT IS FURTHER ORDERED, that the petitions to suspend or reject the tariff transmittals listed in para. 10 ARE DENIED except to the extent indicated herein.

14. IT IS FURTHER ORDERED, that the motion filed by Western Union on February 24, 1988 requesting an additional set of pleadings and extension of the suspensions IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

## FOOTNOTES

[1] Annual 1988 Access Tariff Filings, DA 87-1876, released Dec. 24, 1987 (*December 24 Order*).

[2] Specifically, we suspended until March 1, 1988 the special access rates filed by Ameritech (except Indiana), Bell Atlantic, New England Telephone and Telegraph Company, New York Telephone Company, US West (except Pacific Northwest Bell), the GTE Operating Companies (California, Florida, Texas, and Washington), Cincinnati Bell, and Southern New England Telephone Company.

[3] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, DA 88-16, released Jan. 14, 1988 (*Designation Order*).

[4] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, DA 88-108, released Feb. 2, 1988. This Bureau originally denied a request for a two-week extension and granted the one-week extension on reconsideration, *sua sponte*.

[5] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, DA 88-158, released Feb. 8, 1988.

[6] Bell Atlantic filed its reply one day late with a motion for acceptance of the filing out of time. For good cause shown and because no other party is prejudiced, we grant Bell Atlantic's motion.

## APPENDIX

### NEW ENGLAND TELEPHONE

1. New England Telephone (NET) was among the LECs whose rates were suspended for 60 days by our *December 24 Order*. *Id.* at para. 297. On January 25, 1988, it filed proposed tariff revisions under Transmittal No. 906 as part of the direct case of NYNEX (NET January 25 Filing) to reflect decreased demand for special access. NET states

that it had used historical separations factors in its October 2 filing because it had concluded that historical factors would accurately portray relative growth trends of the various services. In response to this investigation, however, it undertook a special study to compare and correlate separations and demand trends. *Id.* at 22-24.

2. NET begins by developing prospective separations loop counts through a computation of the ratio of prospective to historical average demand for circuits, and then multiplying the result, essentially a demand growth factor, times historical separations loops. NET states that it has used circuit growth rather than channel termination growth because the latter does not correlate closely with loops, especially in instances such as multiplexing of voice grade circuits. It then factors this resuling prospective loop count into the determination of investment assignable to interstate special access in certain aggregated separations categories termed "COE Loop" and "OSP Loop". *Id.* at 24-35.

3. NET performs a similar operation for mileage, determining the ratio of prospective to historical average demand circuit mileage, and then multiplying the result times average historical separations mileage. It adjusts the demand mileage to reflect voice grade equivalents of high capacity lines. It then factors this resulting prospective separations mileage quantity into the determination of investment assignable to interstate special access in an aggregated separations category termed "mileage". *Id.* at 25-38.

4. The revised separations of Cable and Wire Facilities (CWF) and Central Office Equipment (COE) categories are then incorporated into NET's special access rates, yielding a reduction of $9.2 million, as well as increases to switched access services.

5. Western Union's opposition raises a large number of objections to NET's tariff revision. Many of these concern alleged clerical errors, inconsistencies with data from other sources, failures to cite documentary support for various items and similar problems.[1] NET has addressed virtually every one of these matters in its reply, especially in the Exhibits. Such matters go to the reliability of NET's instant tariff revisions and supporting materials.

6. Western Union challenges NET's adjustment to Category 1 CWF (non-wideband exchange) and Category 2 CWF (wideband and exchange trunk) on several grounds, including NET's aggregation of these two categories and NET's use of circuits rather than channel terminations to determine prospective loop counts. Western Union Opposition at 66-73. Similarly, Western Union attacks NET's adjustment of Category 3 CWF (non-wideband interexchange) for including wideband in that category and for increasing the mileage allocator to reflect voice grade equivalencies for multiplexing on high-capacity lines. *Id.* at 73-78. Western Union makes similar arguments about aggregation and inappropriate allocators with respect to the various COE categories. *Id.* at 78-82. It then undertakes to adjust these categories by disaggregating them, drawing data from other sources and adopting different allocators; in this way, it computes that NET has overstated total special access assignments by $79 million. *Id.* at 70-73, 77-80, 82-83.

7. NET's reply addresses nearly all of Western Union's criticisms. NET defends its use of circuit growth, rather than channel termination growth, to determine prospective loop counts because the latter displays distortions when voice grade circuits are multiplexed onto high capacity lines. NET Reply at 8-10. NET offers similar arguments in defense of its use of mileage growth rather than circuit growth for adjustment of Category 4.23 COE (non-wideband interexchange). *Id.* at 10-12. Finally, NET presents a demonstration that disaggregation of CWF and COE to the category level (using NET's own selection of allocators and data sources) would result in an increase to special access revenue requirements of almost $1 million. *Id.* at 12-18.[2]

8. Finally, Ad Hoc argues that NET did not adjust its separation factors to reflect demand decreases. Ad Hoc Opposition at 22-23.

**GTE TELEPHONE OPERATING COMPANIES**

9. The GTE Telephone Operating Companies of California, Florida, Texas and Washington (GTOC) are among the LECs whose rates were suspended for 60 days by our *December 24 Order*. *Id.* at para. 297. On January 25, 1988, GTOC filed a direct case defending its cost-demand computations. GTOC did not file any revised rates.

10. GTOC's direct case is extremely brief. The only specific information regarding the cost-demand issues described in he *December 24 Order* and the *Designation Order* are: an attachment listing allocator quantities and percentage special access interstate factors asociated with each CWF and COE category for the historical period; a similar attachment for the prospective period; a third attachment listing cost and rate units for rate development associated with particular special access services; and a paragraph discussing variances in these units arising from colocated AT&T facilities GTOC Direct Case at 14, and Attachments 1-3.

11. Several of the oppositions note discrepancies in GTOC's direct case, including, among other things: that it fails to explain and properly implement its direct assignments; that it fails to show how current mileage and circuit termination quantities reflect demand; that it is inconsistent with data from other sources; and that relationships between route and circuit miles are anomalous. Western Union Opposition at 107-110; AT&T Comments at 6, 21. GTOC offers refutations to many of these criticisms in its reply.

12. The problem with GTOC's direct case, however, is not only that there are apparent defects and anomalies. In addition, there is an almost complete absence of any explanation of specific methods or the data to which GTOC applies those methods. The first eight pages of its discussion section consist of extremely general claims of compliance with the relevant separations rules of Part 36, followed by verbatim excerpts from those rules. Direct Case at 3-10. In response to Sections 1 and 2 of the *Designation Order*, requesting historical and prospective factors at the separations category level and the associated basic data for the allocators, GTOC provides no detailed explanation of the development of most category assignments from the associated allocator factors. Nor is there any explanation of what particular types of facilities are contained within each of those categories or how this determination was made.

13. Although the GTOC reply has provided more information in response to some of the objections of the other parties, GTOC supplied so little information in the first instance that neither the other parties nor this Bureau

could evaluate its case. In effect, GTOC filed its real direct case in the reply, and the other parties have had no opportunity to lodge oppositions against this reply.

14. GTOC's discussion of the correlation of loop demand and allocation factors illustrates this problem. Attachment 1 to the direct case displays loops and corresponding interstate special access factors for all of the CWF and COE categories for the historical period. Attachment 2 displays data of the same kind for the prospective period. This data is accompanied with assertions that allocation factors reflect demand, but with no concrete explanation of how this is so. In its reply, GTOC "highlight[s] this justification" by providing a new attachment which shows the historical and prospective loops and factors together. GTOC Reply at 4. GTOC then observes that the demand quantities and factors do indeed move in tandem for Texas and Washington, but not for California and Florida. It then explains that, in the latter two states, the absolute number of total loops increases in greater proportion than the special access loops. *Id.* at 4-5.

**AMERITECH**

15. Ameritech was among the LECs whose rates were suspended for 60 days by our *December 24 Order*. *Id.* at para. 297. On January 25, 1988, it filed proposed tariff revisions under Transmittal No. 153 (Ameritech January 25 Filing) to reflect decreased demand for special access. Ameritech explains that its October 2 filing had employed historical separations factors in spite of forecast demand decreases in voice grade services because forecast demand increases in more costly high capacity services generally compensated for the decline. It then states that, in retrospect, use of historical separations factors to capture the net effect of opposing demand changes is a less precise method than use of prospective demand change factors applied to corresponding separations category investments. *Id.* at 4.

16. Unlike the other LECs, Ameritech does not adjust separations allocator data, such as loop counts, by the proportional change in the corresponding demand data, such as channel terminations, and then apply the resulting factor to separations category investment. Rather, it directly adjusts category investment by the proportional demand change. It determines this change factor by the difference between the past year cost of service (PYCOS) period and the prospective period. Ameritech asserts that this "surrogate" method would apply the demand change evenly to all affected categories and would facilitate timely implementation of its new special access rates. *Id.* at 4-5.

17. Category 1 CWF (non-wideband exchange) investment is adjusted by the weighted percentage decline in channel termination demand. Category 2 CWF (wideband and exchange trunk) is not adjusted because high capacity investment is assigned entirely to Category 3 CWF (interexchange). Category 3 CWF is first disaggregated into analog and high capacity components. The analog component is then adjusted by the weighted percentage decrease in interexchange channel mileage; the high capacity component is adjusted by the weighted percentage increase in channel terminations for the fixed element, and in circuit mileage for the variable element, respectively. *Id.* at 6-8.

18. Category 4.11 COE (wideband exchange) and Category 4.12 COE (wideband and non-wideband exchange trunk) are not adjusted because no investment from these categories is assigned to special access. Category 4.13 COE (non-wideband exchange) is adjusted by the same factor as the associated Category 1 CWF described above. Category 4.22 COE (wideband interexchange) is not adjusted because high capacity investment is included in Category 4.23 COE (non-wideband interexchange), as described immediately below.

19. Ameritech historically has included wideband interexchange circuit equipment in Category 4.23, weighted as 24 equivalent voice grade channels to account for multiplexing on DS 1 lines. For purposes of this filing, it disaggregates wideband and non-wideband interexchange circuit equipment in Category 4.23 and assigns the wideband portion to Category 4.22. [3] This Category 4.22 investment is then increased by circuit demand, excluding zero-mile circuits, while the remaining Category 4.23 is decreased by the same factor as Category 1 CWF.

20. The revised separations of CWF and COE investments, as well as revised separations of other investments which are functions of COE and CWF allocations, are then incorporated into Ameritech's special access service rates under Part 69. The indicated revenue requirement change for Illinois Bell is a decrease of $2.6 million or 1.7 percent, and this is implemented in the instant tariff transmittal. The indicated changes for Ameritech's other companies are increases ranging up to approximately 5 percent, but Ameritech has not filed tariff increases at the present time.

21. Western Union's opposition raises a broad range of issues, each of which brought forth a reply from Ameritech.

22. Western Union begins by noting that Ameritech developed its revisions by applying demand increase factors directly to separations category investment rather than to separations allocator data, as required by our *Designation Order*. Western Union Opposition at 11-12. Ameritech responds that use of its surrogate method was necessary because recomputation of separations allocators would have required several weeks and would have entailed corresponding adjustments throughout its switched and special access rate structure. It contends that its approach reasonably achieves the end result sought by this Bureau, given the time constraints. Ameritech Reply at 13-17.

23. Western Union challenges Ameritech's revision of Category 4.23 COE on three major grounds. Western Union Opposition at 18-27. First, Western Union asserts that the high capacity portion of this category should have been in Category 4.22 from the beginning, and that the disaggregation undertaken for this filing creates serius cost distortions. Second, it claims the weighting factor of 24 voice grade equivalents greatly overstates the actual cost differential between high capacity and voice grade facilities. Third, it disputes Ameritech's inclusion of zero-loop circuits in the demand change computation for the non-wideband portion because such circuits have no interoffice circuit equipment. Western Union offers computations showing that use of a more realistic cost factor for the high capacity facilities and use of circuits exclusive of zero-mile circuits for the non-wideband allocation would increase the reduction for Illinois Bell, taken as an example, from $3.7 million to $20.3 million. *Id.* at 27.

24. In response, Ameritech first notes that the inclusion of wideband in Category 4.23 was "a program problem which was known at the time and is in the process of being corrected." Ameritech Reply at 24. With respect to the weighting of high capacity COE by a factor of 24,

Ameritech states that this was utilized to arrive at a reasonable result by a simple approach, and that this same approach also excluded cost assignments for carrier-provided termination and multiplexing equipment and DS3 facilities. Arguing that refinements of the sort advocated by Western Union should be a two-way street, Ameritech revises its Category 4.22 assignment to reflect the actual cost of high capacity equipment, rather than a derived cost of 24 voice grade equivalents and to reflect the cost of carrier-provided termination and multiplexing equipment (but not DS3). *Id.* at 27-28.[4] Ameritech also concedes that the allocator for the remaining analog assignment in Category 4.23 should not include zero-mile loops, and it revises its separations accordingly, increasing the reduction for Illinois Bell from $3.7 million to $12.3 million. *Id.* at 29-30.[5]

25. Western Union contends that Ameritech's assignments to Category 1 CWF (non-wideband exchange) and Category 4.13 COE (non-wideband exchange), both of which concern analog loop, are incorrect in that these assignments utilize weighted circuit counts rather than weighted channel terminations. It argues that there is no constant relationship between circuits and loops, as illustrated by discrepancies involving multipoint circuits and WATS circuits. Western Union Opposition at 27-31. Ameritech replies that there is no constant relationship between loops and channel terminations either, as illustrated by the effects of conversion from analog to high capacity services, and that its usage of circuits as an allocator is reasonable. Ameritech Reply at 30-33.

26. Western Union recommends adjustments to Category 2 CWF (exchange trunk and wideband) and Category 4.12 COE (wideband exchange trunk). Western Union Opposition at 27-34. In both cases Ameritech responds with revisions using different allocator than Western Union. Ameritech Reply at 33-35.

27. In sum, Western Union proposes that Ameritech reduce its special access revenue requirement below its January 25 filing by $50 million for Illinois Bell and by $106 million for the total regional company. Western Union Opposition at 35-38. Ameritech has responded with additional reductions of $0.9 million for Illinois Bell, and with an indicated increase of $8.0 million for the total regional company, for which it is not requesting tariff approval. Ameritech Reply, Attachment E.

**US WEST**

28. Mountain Bell and Northwestern Bell (but not Pacific Northwest Bell) were among the LECs whose rates were suspended for 60 days by our *December 24 Order*, and who filed tariff revisions on January 25, 1988 (US West January 25 Filing). Mountain Bell and Northwestern Bell filed their revisions jointly under Transmittal No. 128, and their methodologies are materially identical. For ease of reference, we shall refer to them herein as "US West", with the understanding that Pacific Northwest Bell is not included.

29. US West states that it used historical separations loop counts in the October 2 filing because at the time it had an engineering database which could not indentify channel terminations to loops. By January 1988, however, it converted to a billing database (CABS) which did provide that capability, including recognition of two-wire, four-wire, wideband, Centrex, and colocated channel terminations. US West January 25 Filing at 4-6. Based on these data, it computed prospective separations loops by multiplying the prospective channel terminations times the historical loop to channel termination ratio (with adjustments to reflect analog equivalents of wideband loops). The resulting separations factors were then applied to the appropriate categories of investment. The attached workpapers omitted some of the detailed steps in developing these revised separations. *Id.* at 6-7 and Workpapers 1 to 3.

30. US West states that, unlike the prospective loop counts in its October 2 filing, the prospective interexchange circuit miles underlying the separations in that filing "do reflect the forecasted trends for interexchange circuit miles." US West January 25 Filing at 4. Then, after discussing the difficulties of reconciling separations mileage and separations circuit terminations with corresponding demand units, it states that there were no inconsistencies evident between separations interexchange miles or circuit terminations, on the one hand, and demand units on the other. *Id.* at 10. Accordingly, it makes no additional adjustment for categories which are allocated by these factors.

31. US West then factors the revised loop counts into its separations assignments and Part 69 rate development, arriving at reductions in special access rates of $11.2 million for Mountain Bell and $4.0 million for Northwestern Bell, with compensating changes to switched access and common line.[6]

32. Western Union's opposition states that it was unable to devote sufficient time to US West's January 25 filing to analyze it adequately. It does, however, offer some observations.

33. Several of these points concern gaps, irregularities, and inconsistencies in the supporting data, as well as inconsistencies of that data with information from other sources. Western Union Opposition at 91-94, 97-99. AT&T also indicates problems of this kind. AT&T Comments at 12, 14, 18-19. US West's reply addresses virtually all of these points. US West reply at 6-10, 12-14.

34. Western Union disputes US West's assertions that the interexchange circuit mileage underlying its October 2 filing reflects forecasted trends and that separations and demand mileage cannot be reconciled. Accordingly, it urges that US West's billing mileage from its October 2 filing TRP be employed to compute a reduction in its prospective separations mileage for Category 3 CWF (non-wideband interexchange). Western Union Opposition at 94-96. US West replies by reiterating that reconciliation of these mileage units in inappropriate. US West Reply at 15.

35. Although most of the other LECs do make some effort to adjust separations mileage to reflect demand mileage, all LECs state that such reconciliation is very difficult, if not impossible.

36. Western Union also challenges US West's failure to provide its prospective circuit termination count for Category 4.23 COE (non-wideband interexchange). Western Union recommends that a count of circuits be used (excluding zero-mileage circuits), drawn from US West's December 23, 1987 filing in CC Docket No. 80-286. *Id.* at 96. US West responds by providing the prospective circuit terminations it is actually using for its separation. US West Reply at 13-14.

37. Western Union recommends various adjustments as well as some other assumptions, and computes that Mountain Bell's separations investment should be reduced by

$73.4 million and that Northwestern Bell's separations investment should be reduced by $41.0 million. Western Union Opposition at 98-101. US West refutes this demonstration line by line. US West Reply at 17-19.

38. In its comments, AT&T notes that Mountain Bell's tariff implementation of the cost-demand adjustments is computed on a 12-month basis even though its current rates will be effective until February 29, 1988. AT&T Comments at 10, n.1. US West replies that the currently effective rates are not lawful, that reductions of this type are inconsistent unless an LEC can also increase its rates for revenue shortfalls in the same period, and that the Commission did not request adjustments of this sort in this docket. US West Reply at 16.

**BELL ATLANTIC**

39. Bell Atlantic was among the LECs whose rates were suspended for 60 days by our *December 24 Order*. *Id.* at para. 297. On January 25, 1988, it filed proposed tariff revisions under Transmittal No. 231 (Bell Atlantic January 25 Filing) to reflect decreased demand for special access.[7]

40. Bell Atlantic adjusts prospective separations allocator quantities for changes in demand by computing the ratio of average historical separations units to average historical demand units, and then multiplying the resulting ratios times prospective demand units. The allocator quantities are then factored into the appropriate separations categories to yield the adjusted assignment to interstate special access. Bell Atlantic January 25 Filing at 2-1 to 2-3.

41. Category 1 CWF (non-wideband exchange) is developed from actual historical loop counts for the separations units and from actual historical and projected CABS channel terminations for the demand units. The adjusted separations loop count for Bell of Pennsylvania, however, is revised from reflecting an indicated decrease of 20.07 percent to a decrease of 3.55 percent; similarly, for Diamond State, it is revised from an indicated decrease of 0.64 percent to an increase of 14.50 percent. *Id.*, Figure 2-1. The only explanation is that "the historic ratio was adjusted to reflect anticipated conditions in 1988." *Id.* at 2-4, n. 1.

42. Category 2 CWF (wideband and exchange trunk) is derived from Category 1 CWF by a loop to trunk ratio determined in special studies. *Id.* Category 3 CWF (non-wideband interexchange) is developed from actual historical circuit miles for the separations units and from actual historical and projected CABS interoffice route miles for the demand units. The circuit mileage to route mileage factors for Bell of Pennsylvania and Diamond State are adjusted to out of trend levels comparable to the loop to circuit termination factors discussed above. *Id.* at 2-7.

43. Category 4.13 COE (non-wideband exchange) is adjusted by the same method (and numerically the same loop to circuit termination ratio) as the associated Category 1 CWF, including the out of trend adjustments for Bell of Pennsylvania and Diamond State. Category 4.12 COE (wideband and non-wideband exchange trunk) is derived from Category 4.12 by the same kind of loop to trunk ratio as Category 2 CWF. Category 4.23 COE (non-wideband interexchange) could not be adjusted by the same ratio method as the others because the separations allocator for that category recently has been changed from circuit miles to circuit terminations, for which Bell Atlantic states it has no historical records. Accordingly, prospective CABS circuit terminations are used as the allocator, with a hypothetical circuit mile ratio adjustment calculated as a check for reasonableness. *Id.* 2-3 to 2-8.

44. The revised separations of CWF and COE are incorporated into Bell Atlantic's Part 69 rates and result in a reduction of $8.5 million. Bell Atlantic states that the revised separations allocations also affect switched access service and common line revenue requirements. *Id.* at 3-1.

45. The replies of Western Union, MCI, and AT&T raise a number of objections to Bell Atlantic's January 25 filing. Many of these concern alleged clerical errors, inconsistencies with data from other sources, failures to cite documentary support for various items, and similar problems.[8] Bell Atlantic has addressed virtually every one of these points in its reply.

46. The most serious criticism raised by Western Union is the lack of any explanation of the out of trend adjustments for the loop and mileage factors of Bell of Pennsylvania and Diamond State. Directly or indirectly, these factors control Categories 1, 2, and 3 CWF and Categories 4.12 and 4.13 COE. Bell Atlantic's reply states that the adjustments are the results of a trend analysis undertaken to account for migration from voice grade to high capacity circuits, and it attaches a list of these factors as projected to several years in the future.

**CINCINNATI BELL TELEPHONE COMPANY**

47. Cincinnati Bell Telephone Company (Cincinnati Bell) is among the LECs whose rates were suspended for 60 days by our *December 24 Order*. *Id.* at para. 297. On January 25, 1988, it filed proposed tariff revisions under Transmittal No. 485 (Cincinnati Bell January 25 Filing) to reflect decreased special access demand associated with loop allocated categories. Cincinnati Bell explained that its original 1988 Annual Access Tariff Filing was designed to reflect demand changes in separations cost assignments. By an unintentional error, however, it failed to include the most recent decline in loop demand, thereby overstating its cost assignments by a corresponding amount. Its proposed tariff revision seeks to correct that error. Its circuit mileage, on the other hand, does reflect recent demand changes. *Id.* at 7-9.

48. Cincinnati Bell states that it uses current actual loop and mileage demand to develop separations assignments. It also periodically updates its separations process to reflect new studies on various investment categories. In order to check its assignments, it performs ratio analyses, comparing, for example, the ratio of special access loops to total interstate loops with ratio of Category 1 Cable and Wire Facilities (CWF) (non-wideband exchange). *Id.* Similarly, it compares historical and prospective investment assigned to separations categories with associated demand changes. It analyzes the cause of apparent discrepancies in those figures for the instant filing, namely two recent new basic studies of circuit equipment and outside plant. *Id.* at 5-6, 17 and Figure 2-9.

49. Cincinnati Bell's responds to the *Designation Order* by proposing a decrease of $.6 million in special access revenue requirements, to reflect its inadvertent omission of the most recent loop count from its October 2 filing. It should be noted that, unlike the tariff submissions of all the other LECs in this docket, Cincinnati Bell is revising only its data, not its method. *Id.* at 7-8.

50. Western Union states that it did not have sufficient time to review Cincinnati Bell's submission adequately, but it does offer some observations. Western Union Opposition at 5, 102-106. It claims that Cincinnati Bell did not provide complete information on its separations assignments procedures, its recent basic studies, its conversion from demand units to separations units and other matters. *Id.* Cincinnati Bell's reply addresses every one of these issues at length, explaining the methods and data from its January 25 filing more completely. *Id.* passim.

## FOOTNOTES FOR APPENDIX

[1] These include allegations: that NET uses unexplained weightings to make substantial increases in separations allocator (Western Union Opposition at 57-58); that interrelated items, such as unit cost, unit quantity and total cost, are internally inconsistent (*id.* at 59-62); and that NET's data here is inconsistent with data from its October 2 Filing Tariff Review Plan (TRP) and from its December 23, 1987 filing in CC Docket No. 80-286 (*id.* at 62-65).

[2] This calculation took account of NET's concession to Western Union's argument that General Support Facilities should have been reduced as an indirect effect of the revised separations allocators. *Id.* at 18.

[3] Ameritech's references to Categories 4.22 and 4.23 are somewhat confusing because 4.22 includes high capacity insofar as it is revised in Ameritech's January 25 Filing, but it excludes high capacity apart from that filing.

[4] Ameritech also states that this revision meets the objections of Ad Hoc regarding the cost of multiplexing.

[5] *Compare* Ameritech filing of January 25, 1988, Table 3, Illinois Bell, 1.4, c. 1, *with* the same Table for the Ameritech filing of February 18, 1988.

[6] The revisions to Mountain Bell's revenue requirements are $7.4 million for common line, $1.0 million for switched traffic, and a decrease of $11.2 million for special access, yielding a net reduction of $2.9 million. The revisions to Northwestern Bell's revenue requirements are $2.8 million for common line, $0.2 million for switched traffic, and a decrease of $4.0 million for special access, yielding a net reduction of $0.9 million. US West states that it will notify the National Exchange Carrier Association (NECA) of the increase in Carrier Common Line revenue requirements.

[7] In its D & J, Bell Atlantic presents two other tariff revisions in addition to the one in this docket, consisting of: (1) a reduction of $6.0 million stemming from errata for the 1988 Annual Access Filing (*see* Bell Atlantic Application No. 64, filed Dec. 14, 1987); and (2) a reduction of $10.7 million stemming from disallowances in our *December 24 Order*. Bell Atlantic January 25 Filing at 1-2 to 1-3.

[8] These include allegations: that there were clerical errors in transferring the indicated total company revenue requirement reductions to individual state revenue requirements (Western Union Opposition at 40-42; AT&T Opposition at 9-10); that Bell Atlantic's data in the instant filing conflicts with data filed December 23, 1987 in CC Docket No. 80-286 (Western Union Opposition at 42-44, 53-56); that Bell Atlantic has not documented the trunk to loop ratios used for Categories 2 CWF and 4.12 COE (*id.* at 49-52); and that Bell Atlantic is vague about how it derived its adjustments from CABS (MCI Opposition at 10-11).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-26**

In the Matter of

Inquiry into Section 73.1910 of
the Commission's Rules and
Regulations Concerning Alternatives
to the General Fairness Doctrine
Obligations of Broadcast Licensees

## MEMORANDUM OPINION AND ORDER

**Adopted: March 24, 1988** **Released: April 7, 1988**

By the Commission:

## INTRODUCTION AND BACKGROUND

1. On February 13, 1987, the Commission began an inquiry proceeding in the above-captioned matter regarding fairness doctrine alternatives.[1] The purpose of this inquiry was to solicit public comment and information on possible alternatives to enable the Commission to comply with a congressional directive that the Commission "consider alternative means of administration and enforcement of the Fairness Doctrine and . . . report to the Congress by September 30, 1987."[2] Subsequently, after a careful review of the record developed in that proceeding, the Commission issued its *Report* in the above-entitled matter.[3]

2. In the *Fairness Alternatives Report*, the Commission examined nearly a dozen proposed alternatives to its existing administration and enforcement of the fairness doctrine. Some of these had been considered on previous occasions, some were the subject of pending proceedings related to the fairness doctrine, and others were advanced for the first time in the comments submitted in the proceeding. The criteria that were used in analyzing each of the alternatives were: (1) whether the net effect of the alternative increases the public's access to the marketplace of ideas, *i. e.*, eliminates the chilling effect of the doctrine and enhances the flow of program and idea diversity to the public, and (2) whether the mechanism employed minimizes or eliminates governmental intrusion in the editorial decisionmaking of broadcasters. Thus, in order to best fulfill its objective, the Commission not only considered whether each alternative raised would eliminate the chilling effect of the doctrine but compared each alternative to its existing enforcement of the fairness doctrine to determine whether it represented a more favorable, *e.g.*, less intrusive, means of fairness doctrine enforcement.

3. In applying these criteria, the Commission found that some of these alternatives were clearly preferable to the existing enforcement because they represented less intrusive governmental incursions into the journalistic discretion of broadcasters (*e. g.*, applying a "malice" standard of review to fairness doctrine complaints). Others were found by the Commission to be even less appealing than the existing doctrine because they created greater risks of governmental involvement in the speech of broadcasters (*e. g.*, review of fairness doctrine complaints at renewal time) or because they appeared to promote, even less than the existing doctrine itself, the possibility of achieving the First Amendment objectives of increasing the public's access to program and viewpoint diversity (*e. g.*, access alternatives).

4. As a result of an exhaustive analysis of the alternatives, the Commission concluded that "the best alternative to the doctrine and the one that best serves the First Amendment principles underlying the doctrine, and consequently, our public interest objectives, would be an unregulated marketplace of ideas."[4] It therefore recommended to Congress "that broadcast journalists be allowed to fulfill their journalistic duties as professionally as their newspaper and magazine counterparts."[5]

## GELLER AND LAMPERT PETITION

5. On September 1, 1987, Henry Geller and Donna Lampert (Geller and Lampert) filed a petition seeking reconsideration of the *Fairness Alternatives Report*.[6] In so petitioning, Geller and Lampert stress that the Commission erred in not adopting: (1) a malice standard of review for determining whether a fairness violation has occurred on *either* a renewal or case-by-case basis, and (2) a voluntary access scheme.[7] Although they raise these matters in the context of this petition for reconsideration of our *Report* in this proceeding, they concede that their real interest lies in the agency's failure to consider and adopt, short of repeal of the general fairness doctrine, any alternative measures in the *Syracuse Peace Council* proceeding.[8] In this regard, they seek clarification in this proceeding as to whether the Commission's action in the *Fairness Alternatives Report* was intended to represent a policy statement on the fairness doctrine or merely to serve as a report to Congress.

6. On October 27, 1987, the Office of Communication of the United Church of Christ and the Communications Commission of the National Council of Churches (UCC) jointly filed comments in opposition to Geller and Lampert's petition for reconsideration insofar as it seeks enforcement of the doctrine through a "renewal-only" approach. UCC argues that the Commission previously has considered and rejected this approach to fairness doctrine enforcement and that this action has been upheld on appeal.[9] Moreover, UCC argues, a "renewal-only" approach is impracticable and tantamount to no enforcement at all.

## DISCUSSION

7. In the *Fairness Alternatives Report*, we reviewed an extensive array of alternatives to the existing fairness doctrine in order to prepare a thorough and comprehensive document. As mentioned previously, the *Report* was prepared at the specific direction of Congress. In fulfilling this Congressional directive, we sought to ensure that alternatives were "given careful consideration and that our findings and conclusions . . . were based on a thorough and comprehensive record."[10] Although this inquiry was aimed at formulating recommendations to Congress, as we observed in our *Report*, circumstances and events have so dramatically altered our original perception of the doc-

trine that a reassessment of our prior positions on fairness doctrine alternatives appeared appropriate under the public interest standard.[11] Accordingly, the findings and conclusions reached in the *Fairness Alternatives Report* represented not only our recommendations to Congress, but( also were intended to be dispositive of the desirability of any of the fairness doctrine alternatives considered in light of changed circumstances that may have occurred since our earlier consideration of fairness doctrine alternatives.[12] Our review here shall consider the question of the extent, if any, to which we should revise -- in light of the petition before us -- the views we reached in the *Fairness Alternatives Report* and our ultimate( conclusion that the best alternative is an unregulated marketplace of ideas. After a careful review of the instant petition, we conclude that no material revision is in order and, therefore, consistent with our report, no further action is warranted. The reasons for this conclusion are briefly recited below and more fully amplified in the order also adopted today involving petitions for reconsideration of our *Syracuse Peace Council* decision.

8. In their reconsideration petition, Geller and Lampert recommend that the Commission consider the following fairness doctrine alternatives: (1) a voluntary access scheme; (2) a review of fairness doctrine complaints at renewal only using a malice standard; and (3) a review of fairness doctrine complaints on a contemporaneous, case-by-case basis using a malice standard.[13] Two of these proposals, namely, access and renewal-only review using a malice standard, previously have been considered and rejected by the Commission. With respect to these alternatives, we believe that the evidence and analysis provided in the *Fairness Alternatives Report* are both substantial and thorough and that petitioners have provided no basis for disturbing them on reconsideration.

9. Geller and Lampert also suggest, however, that the Commission consider a case-by-case review of fairness doctrine complaints using a malice standard to judge individual complaints as well as overall compliance with the doctrine. According to petitioners, while the Commission found that a malice standard applied to fairness complaints would decrease the intrusiveness of the doctrine, it rejected a malice standard in the *Fairness Alternatives Report* because its application had been urged at renewal only, thereby retaining the significant chilling effects of the doctrine. To cure this defect, Geller and Lampert believe that malice should be applied to a case-by- case enforcement of the fairness doctrine.

10. As pointed out above, in the *Fairness Alternatives Report*, we considered a malice test in the context of renewal-only review. Although we found that a malice standard would be more desirable in some respects than the then-existing means of administering the fairness doctrine in that it would alter or diminish the need for government intrusion into the editorial judgments of licensees, we ultimately determined that the overall level of government scrutiny under this approach would in fact be magnified because of the need to examine and resolve all fairness doctrine questions in the context of license renewals. Consequently, we found that the net effect of this approach would actually be to increase the level of government oversight of broadcasters' presentation of controverial issues and, concomitantly, the chilling effect upon licensee conduct.

11. With these findings in mind, we do not believe Geller and Lampert's proposal that the malice standard be applied on a case-by-case basis to fairness doctrine complaints would cure the doctrine of the constitutional infirmities identified in the *Fairness Alternatives Report*. We are not convinced that their proposal is substantially different from their renewal- only approach or from the Commission's previous practice of deferring to licensee's reasonable judgments so as to warrant reconsideration of any of the conclusions reached in the *Fairness Alternatives Report*.[14] As we stated there, although a malice standard might *reduce* the government intrusion into the editorial process associated with the fairness doctrine as administered at that time,[15] we did not conclude that such an approach would reduce it to the extent necessary to eliminate the chilling effect of the doctrine that would render it unconstitutional under the *Red Lion* standard. Nor have petitioners presented any evidence to convince us that their most recent variant of the malice approach would remedy the constitutional deficiencies identified with the fairness doctrine in our *1985 Fairness Report* [16] and our August order in *Syracuse Peace Council*. Although petitioners' proposal of a malice standard attempts to reduce governmental intrusion, petitioners have not shown that it would lessen the chilling effect of the doctrine on the presentation of controversial issues of public importance sufficiently to make it acceptable from a constitutional and public interest perspective. The difference in its impact on licensees, therefore, would be a matter of degree rather than of( kind. Accordingly, we reject petitioner's proposal as an unacceptable alternative.[17]

## CONCLUSION

12. Our consideration of the substantive issues raised in the Geller and Lampert petition leads us to conclude that reconsideration of our *Fairness Alterative Report* is neither necessary nor desirable. As noted above, we previously have considered and rejected as alternatives a malice standard to be applied at renewal-only as well as a voluntary access scheme. No evidence has been presented that convinces us that our analysis therein was incorrect. With respect to a malice standard applied on a contemporaneous case-by-case basis, we find that, while it may lessen the chilling effect of the fairness doctrine as previously administered, it would not, in our estimation, reduce this effect to such an extent as to make the fairness doctrine less objectionable from a constitutional and public interest standpoint. Because under this approach the fairness doctrine as a whole would still remain, would also represent an unwarranted intrusion into the journalistic freedoms of broadcasters, and, more importantly, would not significantly improve prospects for increased diversity of viewpoints and ideas to the public, we find this approach to be an unacceptable alternative under the First Amendment and the public interest standard.

13. Accordingly, IT IS ORDERED that the petition for reconsideration filed September 1, 1987 by Henry Geller and Donna Lampert IS DENIED.

14. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] *Notice of Inquiry into Section 73. 1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees (MM Docket No. 87 - 26),* 2 FCC Rcd 1532 (1987) (*Notice of Inquiry).*

[2] *Making Continuing Appropriations for the Fiscal Year 1987,* Pub. L. No. 99-! 591, Title V, 100 Stat. 3341, 3341-67 (1986). *See also Conference Report to ! Accompany H. J. Res. 738,* H.R. Rep. No. 1005, 99th Cong., 2d Sess., 430-431 ! (1986).

[3] *Report of the Commission in the Matter of Inquiry into Section 73. 1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* (MM Docket No. 87-26), 2 FCC Rcd 5272 (1987) (*Fairness Alternatives Report or Report).*

[4] Fairness Alternatives Report, 2 FCC Rcd at 5295.

[5] Id. On the same day the Commission issued this Report, it also adopted a *Memorandum Opinion and Order* in *Syracuse Peace Council against Television Station WTVH,* 2 FCC Rcd 5043, *appeal pending sub nom. Syracuse Peace Council, v. FCC,* No. 87-1516 (D.C. Cir. filed August 7, 1987), *("Syracuse Peace Council"),* in which it held that the fairness doctrine violated the First Amendment and contravened the public interest.

[6] On the same day, Geller and Lampert also filed a petition seeking reconsideration of the Commission's action in *Syracuse Peace Council.* The Commission subsequently invited public comment on these petitions through issuance of a public notice referencing these matters. 52 Fed. Reg. 36,630 (Sept. 30, 1987).

[7] As we pointed out in the *Fairness Alternatives Report,* Geller and Lampert have advocated on previous occasions that the agency adopt a malice standard in the context of a renewal-only review of fairness complaints. They have also previously urged the Commission to implement a voluntary access approach.

[8] In their petition, Geller and Lampert state that "the reasons . . . for this petition for reconsideration do not differ from those set out in the petition for reconsideration in *Meredith,* and therefore, rather than repeat them here, we urge that the Commission act upon the arguments in the *Meredith* petition for reconsideration." Petition of Geller and Lampert for Reconsideration, at 3. We have done so today by adopting a Memorandum Opinionand Order in that proceeding denying their petition for reconsideration.

[9] *See Fairness Report,* 48 FCC 2d 1 (1974), *recon. denied,* 58 FCC 2d 691, (1976) *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC,* 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978).

[10] *Fairness Alternatives Report,* 2 FCC Rcd at 5272.!

[11] As we stated therein, we have an affirmative duty to re-evaluate our policies in light of changed circumstances, to be alert to the consequences of our policies and stand ready to alter our rule if necessary to serve the public interest more fully. *See FCC v. WNCN Listeners Guild, 450* U.S. 582, 603 (1981); *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.,* 387 U.S. 397, 416, *reh'g. denied,* 389 U.S.889 (1967).

[12] *See, e.g., Report and Order in The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* (BC Docket No. 78-60), 74 FCC 2d 163 (1979) *recon. denied,* 98 FCC 2d 916 (1982). However, as noted in the *Fairness Alternatives Report,* because certain matters raised in the inquiry were also the subject of other pending proceedings, e.g., the personal attack rule under review in the *Notice of Proposed Rule Making* in Gen. Dock et 83-484, 48 Fed. Reg. 28,295 (June 21, 1983), our discussion reflected only tentative views with respect to those pending matters. Because none of the alternatives were found to be as desirable as a marketplace approach, we did not find any need for further agency action.

[13] Under the malice standard of review, a licensee would be considered to have acted with malice if the licensee had deliberately violated the doctrine, thereby exhibiting bad faith, or had demonstrated a pattern of acting in reckless disregard of the doctrine. It would be similar to the approach enunciated by the Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), where it held that a newspaper publisher could not be held liable in damages for defamatory falsehoods relating to the official conduct of a public official unless there was a showing of "actual malice."

[14] For example, one aspect under this approach would be whether a licensee acted with "reckless disregard" of its fairness doctrine obligations, *i.e.,* had established a pattern of violating the fairness doctrine. In the absence of evidence that a licensee had deliberately or flagrantly violated the doctrine in such a manner as to exhibit "bad faith," the Commission would be forced into the position of tracking a licensee's performance over an indefinite period of time in order to determine whether a licensee had established a series or pattern of violations sufficient to warrant a finding of reckless disregard. Thus, a licensee would need to be constantly concerned over heightened governmental surveillance of its coverage of controversial issues in the future once a governmental finding had been made of licensee noncompliance, albeit inadvertent or unintentional, with the doctrine. The net effect might well be for a licensee to avoid future coverage of such issues rather than to run the risk of developing a pattern of violations that might result from a subsequent adverse finding of noncompliance with the fairness doctrine. In this regard, it would appear that a case-by-case approach enforcement using a malice standard would not be very much different from a renewal-only enforcement using the same standard.

[15] *Fairness Alternatives Report,* 2 FCC Rcd at 5298 n.51 (We agree that by adopting an 'actual malice' standard, as suggested by Geller and Lampert, we would reduce to some degree the extent of government oversight in fairness matters and would accord greater journalistic discretion to broadcasters.)

[16] *Report in Gen. Docket No. 84-282 (Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees,* 102 FCC 2d 143 (1985).

[17] Moreover, as noted in the *Fairness Alternatives Report* and as further discussed in our reconsideration order in *Syracuse Peace Council* adopted today, because the existing multiplicityof broadcast outlets allows us to achieve the fairness doctrine's goal of diversity of viewpoints without government intervention, we reconfirm our original conclusion that no variation of the fairness doctrine is needed to achieve the goal of diversity.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Applications of

DAVID LAUSTSEN AND — File No. 6801-CM-P-83

BROADCAST DATA CORPORATION — File No. 2033-CM-P-83

For Authority to Construct and Operate Two Multichannel Multipoint Distribution Service stations on the E-Group Channels and the F-Group Channels for Aberdeen, South Dakota

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 18, 1988; Released: April 19, 1988**

By the Chief, Common Carrier Bureau:

## I. BACKGROUND

1. This case concerns applications filed by David Laustsen (File No. 6801-CM-P-83) and Broadcast Data Corporation (File No. 2033-CM-P-83) for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations to serve the Aberdeen, South Dakota area.

2. On September 9, 1987, the application of David Laustsen for the E-group channels and the application of Broadcast Data Corporation for the F-group channels appeared on public notice. On October 13, 1987, Michael Jon Jilek submitted a letter, described as a petition to deny, in opposition to the referenced applications. On October 22, 1987, Mr. Jilek filed a "revised letter" with the Commission. On November 2, 1987,[1] Broadcast Data Corporation and David Laustsen jointly filed an Opposition to Mr. Jilek's petition to deny. On December 22, 1987, Michael Jon Jilek filed a reply.

3. On November 2, 1987, Broadcast Data Corporation also filed an application amendment, explaining that, at an unspecified time, it had entered into an agreement to assign its "construction permit"[2] to Northern Electric Cooperative, Inc. (Northern Electric). On November 12, 1987, David Laustsen filed a similar application amendment, for an agreement to assign his "construction permit" to Northern Electric. Lloyd Trautmann, as Mayor of Hecla, South Dakota, submitted a letter, dated November 15, 1987, supporting the license application of Northern Electric.

## II. OPPOSITION

4. Michael Jon Jilek submitted in this proceeding three pleadings, two letters and a reply, opposing grant of the above-referenced applications of David Laustsen and Broadcast Data Corporation. Mr. Jilek basically argues that the applicants have agreed to transfer control of the applications; that the proposed transferee is an electric cooperative which has access to low interest loans and lower tax assessments than are available to private competitive businesses, such as Mr. Jilek's home satellite systems, enabling them to provide unfair competition; and that a variety of technologies "currently, or soon will offer more programming, at less cost, then the MMDS system can provide." David Laustsen and Broadcast Data Corporation reply that unless the applications are approved, there is little prospect for MMDS service for Aberdeen in the near term; that MMDS is an appropriate business for electric cooperatives; and that Mr. Jilek's filings are prompted by anti-competitive motives.

5. Mr. Jilek described the letters he submitted as petitions to deny. However, in order to be considered a petition to deny, a pleading must comply with the requirements of Section 21.30(a) of the Commission's Rules, 47 C.F.R. § 21.30(a). Each letter fails to comply with these requirements. Although the first letter was timely filed pursuant to Section 21.30(a)(4), it failed to contain a certificate of service as required by Section 21.30(a)(5). And, although in the second letter Mr. Jilek stated that he was sending a copy of the revised letter to both applicants, it was not filed within thirty (30) days, as required by Section 21.30(a)(4).

6. Mr. Jilek labelled his third pleading a reply, complaining *inter alia* of a lack of service and opportunity to comment on the Opposition of David Laustsen and Broadcast Data Corporation. Because this reply is a responsive pleading, pursuant to Section 21.30(a)(2), it must conform to the filing period of Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), which requires filing within five days after the time for filing oppositions expired. However, Mr. Jilek's reply was filed late, after this five-day filing period. Thus, Mr. Jilek's reply also failed to comply with the requirements of Section 21.30(a).

7. Therefore, pursuant to Section 21.30(b)(1), we classify Mr. Jilek's letters and his responsive pleading as informal objections. Mr. Jilek filed the informal objections at least one day before Commission action, they disclosed his interest, and were signed by him. Each informal objection was read and considered in this proceeding, but each argument presented by Mr. Jilek will not be discussed specifically and fully in this document, pursuant to Section 21.30(c) of the Commission's Rules, 47 C.F.R. § 21.30(c).[3]

## III. APPLICATION AMENDMENTS

8. The amendments of David Laustsen and Broadcast Data Corporation for their assignment agreements demonstrate that Northern Electric has become the real-party-in-interest[4] to these two MMDS applications.[5] It is well established that the test for determining whether a person is a real-party-in-interest is whether that person has an ownership interest, or is or *will be in a position*, actually or potentially, *to control the operation of the station. San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987)(emphasis added). In this situation, there is no question that Northern Electric is currently the real-party-in-interest,[6] because it will be in a position to control the operation of these stations.

9. At the time of station operation, Northern Electric will have a 100% ownership interest in each station. Thus, Northern Electric will be in a position to dictate the manner of operating the proposed MMDS stations. *See*

*WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, 17 Rad. Reg. 2120, 2123 (D.C.Cir. 1958); *see also San Joaquin Television Improvement Corp.*, 2 FCC Rcd at 7008; *Creek County Broadcasting Co.*, 31 FCC 2d 462, 467- 68 (1971). The amendments do not indicate that either David Laustsen or Broadcast Data Corporation is retaining any of the minimum incidents of control. Rather it appears that Northern Electric will have exclusive responsibility for the operation and control of the two MMDS stations. *See Intermountain Microwave*, 24 Rad. Reg. 983, 984-85 (1963). This shows that for these two MMDS stations Northern Electric (not David Laustsen, not Broadcast Data Corporation) will provide the financial support and will make the managerial and technical decisions,[7] and will be responsible for any continuing duties imposed upon MMDS licensees.[8] Northern Electric *will be in a position to control the operation of the stations*.[9]

10. In addition, despite the language of the amendments which mentions only the assignment of construction permits,[10] the very terms of the written assignment agreement demonstrate that the two MMDS *applications* are already assigned to Northern Electric. The written assignment agreement of David Laustsen specifies that Northern Electric purchases "[a]ll right, title, and interest that David Laustsen may have in and to an MMDS license or *application* for the Aberdeen, Brown County, South Dakota area." (emphasis added.) Reciprocally, the agreement specifies that "Laustsen releases, quit claims and assigns to Purchaser all of his right, title and interest, present and [prospective], in each item of property, contract right, *pending application* for construction permit, or license identified in this agreement." (emphasis added.) This is an additional demonstration that Northern Electric is the real party in interest to the application, as well as the prospective construction permittee.[11]

## IV. THE ONE-TO-A-MARKET RULE

11. As the real-party-in-interest, Northern Electric is the applicant for the Aberdeen MMDS application for the E-group channels and is the applicant for the Aberdeen MMDS application for the F-group channels. Section 21.901(d)(2) of the Commission's Rules[12] prohibits one applicant from seeking authority to construct and operate MMDS stations for both the E-group channels and the F-group channels in the same service area. *M & M Communications, Inc.*, 2 FCC Rcd 677 (1987), *appealed*, Case No. 87-1496 (D.C.Cir. filed Sept. 17, 1987); *Associated MDS Corporation*, Mimeo No. 3189 (Common Carrier Bureau March 18, 1986); *Western Tele-Communications, Inc.*, Mimeo No. 3114 (Common Carrier Bureau March 13, 1986). Thus, Section 21.901(d)(2) prohibits Northern Electric from owning or controlling the applications for both the E-group channels and the F-group channels in Aberdeen, South Dakota. Accordingly, the assignment agreements violate the one-to-a-market rule.

12. Although Northern Electric mentions a waiver of the one-to-a-market rule, it has not demonstrated that a waiver is appropriate.

> The Opposition states:
>
> . . . the basis for a waiver is apparent in the case of the Aberdeen market. Absent NEC [Northern Electric], MMDS service will not be provided to the public in the Aberdeen area. Accordingly, the benefits of dividing the licensing of the E and F blocks of channels could not be realized since NEC is the only prospect for the delivery of service on these channels. No purpose is served by licensing only one block of channels and permitting the other block to go unused when a party is ready and able to provide service on both blocks of channels.

Opposition at 7-8.

13. Pursuant to Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19,[13] a request for waiver of the one-to-a-market rule must affirmatively demonstrate that application of the rule would frustrate the underlying purposes of the rule. The Commission's order which adopted the one-to-a-market rule contained lengthy discussions of two of the underlying purposes of the rule, which are especially relevant in this non-lottery situation. The Commission in *Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203 (1983)(hereinafter cited as *MMDS Allocation Order)*, specifically stated:

> Consideration of all these factors does not lead to clear choice for the number of multichannel systems that should be authorized in each area. However, it does appear that in many large areas at least two systems could be viable.
>
> Moreover, authorization of more than one system should provide a number of public interest benefits. Competition between competing systems could stimulate technological innovation, could increase system availability and could also make lower cost service available to the public. We also believe that we should continue to hold a substantial amount of spectrum in reserve for ITFS use. For these reasons, we have concluded that we should make two groups of ITFS channels available for multichannel MDS. *This will allow two competitive MDS operators* to offer multichannel service in those areas and will keep 20 channels in reserve for existing and future ITFS use.

*Id.* at 1245 (footnote omitted; emphasis added). It is significant that the Commission declared in the *MMDS Allocation Order* that it was necessary for there to be two MMDS operators in each service area to resolve another potential problem as well.

> We also recognize that it is possible that the same entity could lease all of the capacity of each common carrier, thereby, precluding others from becoming MDS programmers. Since the public only deals with the customers of the common carrier -- and not the common carrier itself -- the public could be forced to deal with a single multichannel MDS provider. We have considered requiring multichannel MDS licensees to so tariff their service that such an eventuality could not occur. We have decided not to adopt such a requirement for several reasons. First, we believe that the fact that an entity desiring to

lease all available MDS channels *will be required to deal with two common carriers* somewhat reduces the possiblity this will occur.

*Id.* at 1243-44 (emphasis added). Here the applicants provided no analysis of why the application of the one-to-a-market rule for the Aberdeen service area would frustrate the underlying purposes of stimulation of technological innovation, increase in system availability, lowering cost to the public, or stimulation of programming diversity.

14. Also, there has been no demonstration as contemplated by *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir.1969), of the existence of extraordinary or special circumstances justifying waiver of the one-to-a-market rule for the Aberdeen service area. There is no doubt that any potential MMDS operator could judge it advantageous, technically and economically, for it to have the authority for all of the MMDS channels in a given service area. This is the very argument presented by several commenters and rejected by the Commission in *MMDS Allocation Order*, 94 FCC 2d at 1242-45. Moreover, the circumstances that led to denial of a waiver of the one-to-a-market rule in other cases are controlling here. *See M & M Communications, Inc.*, 2 FCC Rcd 677 (1987), *appealed*, Case No. 87-1496 (D.C.Cir. filed Sept. 17, 1987); *Associated MDS Corporation*, Mimeo No. 3189 (Common Carrier Bureau March 18, 1986); *Western Tele - Communications, Inc.*, Mimeo No. 3114 (Common Carrier Bureau March 13,1986). No evidence has been presented showing why Northern Electric merits treatment different from that which we applied to the applicants in those decisions.

15. The applicants assert that Northern Electric is the only entity which potentially would chose to avail itself of this business opportunity. We disagree. The fact that David Laustsen and Broadcast Data Corporation have entered into assignment agreements with Northern Electric merely demonstrates: (1) that David Laustsen and Broadcast Data Corporation offered to assign to Northern Electric, not that they offered to assign to every potential entity; and (2) that Northern Electric was willing to pay the sums David Laustsen and Broadcast Data Corporation required, not that no entity would submit applications to the Commission if allowed to do so, without compensation to David Laustsen and Broadcast Data Corporation.

16. In view of the foregoing, a waiver of the one-to-a-market rule is unsupported as required by Section 21.19. Therefore, the requested waiver is denied.

## V. OTHER RULE VIOLATIONS

17. Review of these amendments for the two MMDS applications raise questions of a lack of compliance with additional Commission rules.

18. *Disclosure of Changes in Application Information.* Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, imposes a continuing duty upon David Laustsen and Broadcast Data Corporation to furnish, at least within thirty (30) days, the information that David Laustsen and Broadcast Data Corporation do not intend to construct and operate the proposed MMDS stations. Instead, it appears they waited more than thirty days to make this disclosure.

19. *Station Management Disclosure.* At the time David Laustsen and Broadcast Data Corporation entered into the assignment agreements with Northern Electric, they decided that neither David Laustsen nor an employee of Broadcast Data Corporation will actively participate in the day-to-day operation of the two proposed MMDS stations, but that an unrelated entity, Northern Electric, would operate the MMDS stations. Therefore, as required by Section 21.13(g), 47 C.F.R. § 21.13(g),[14] they had to submit the prescribed statement concerning control, and a copy of the prescribed contract on station management. We have no record of receipt of the prescribed statement or a copy of the prescribed contract by either David Laustsen or Broadcast Data Corporation.

20. *Application Amendment.* Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a), requires David Laustsen and Broadcast Data Corporation to demonstrate compliance with Section 21.29 of the Commission's Rules, 47 C.F.R. § 21.29, before they can amend their pending MMDS applications.[15] However, neither David Laustsen nor Broadcast Data Corporation made any mention of Section 21.29, or provided any discussion of their compliance with the requirements of Section 21.29. Thus, they failed to provide the type of demonstration necessary to amend their applications in these circumstances.[16]

21. *Service of Amendments.* Section 21.23(e) of the Commission's Rules, 47 C.F.R. § 21.23(e), requires demonstration of service,[17] unless a waiver is requested and granted pursuant to Section 21.23(f) of the Commission's Rules, 47 C.F.R. § 21.23(f). David Laustsen and Broadcast Data Corporation failed to serve and also failed to request a waiver of the service requirement.

22. *Requirement for Timely Notification of Changes in Ownership.* Section 21.29(d)(1) of the Commission's Rules, 47 C.F.R. § 21.29(d)(1), requires written notification "of the existence and general terms of such agreement, the identity of all of the participants, and the applications involved" within ten (10) days after participation in an agreement which may result in a proposed substantial change in ownership or control.[18] Although Broadcast Data Corporation submitted an application amendment which notified us in writing of the existence of the assignment agreement, it apparently did not demonstrate that the written notification was made within ten days after participation in the agreement. David Laustsen also failed to comply with the requirements of Section 21.29(d)(1). His application amendment was submitted 90 days after entering into the assignment agreement, rather than 10 days thereafter as required by Section 21.29(d)(1).

23. *Requirement of Submission of Agreement for Ownership Change.* Section 21.29(d)(2) requires that "a copy of the agreement which clearly sets forth all terms and provisions, and such other facts and information as necessary to satisfy the standards of paragraph (e) of this section" be filed with the Commission within thirty (30) days. David Laustsen did submit on November 12, 1987 a copy of his agreement with Northern Electric, but did so 90 days after entering into the agreement, rather than thirty days thereafter as required by Section 21.29(d)(2). Broadcast Data Corporation failed to submit a copy of the assignment agreement, depriving the Commission of all of its terms in writing, despite a specific request.

24. *Certification Requirement.* Section 21.29(d)(2)[19] requires the submission of a prescribed certification by affidavit of each principal to the agreement. Neither David Laustsen, Broadcast Data Corporation, nor Northern Electric submitted the required certification.

25. *Commission Approval of Ownership Changes.* Section 21.29(e) also requires that the Commission be provided an opportunity to make the public interest findings stipulated by that rule. This is a condition precedent, not a condition subsequent, to the amendment of an application.[20] This requirement of Commission approval was premised on the statutory mandate of Section 309(b) of the Communication's Act of 1934, 47 U.S.C. § 309(b). *1976 Part 21 Rule Making Order*, 38 Rad. Reg. at 365. In this order adopting Section 21.29, the Commission found "that a substantial change in the ownership or control of an applicant (other than in the case of a *pro forma* change), or the substitution of one applicant for another, is an event which changes the identity of the applicant and requires a statutory public notice and a thirty day opportunity for public comment." *Id.* at 372.[21]

## VI. CONCLUSION

26. Pursuant to Section 21.26, we may dismiss MMDS applications as defective if we find that they lack compliance with any of the Commission's rules. More specifically, it was stated in *MMDS Lottery Order*, 50 Fed. Reg. at 5987, that an MMDS application will be dismissed if an applicant is found to be in violation of Section 21.901(d)(2), the one-to-a-market rule. We find that the applicants violated that rule. The evidence in this proceeding suggests that the applicants violated other rules as well.

27. Because the MMDS application for the E-group channels and the MMDS application for the F-group channels for Aberdeen, South Dakota are in violation of Section 21.901(d)(2), IT IS ORDERED that the two above-referenced applications are DISMISSED.[22]

28. This order is issued pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

## FOOTNOTES

[1] We granted the applicants' joint motion for an extension of time for filing their Opposition.

[2] The Commission determined on August 27, 1987 in its Report and Order in CC Docket No. 86-128, Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987), that we will not issue construction permits to authorize the construction of MMDS stations. Instead, conditional licenses are issued. Although Broadcast Data Corporation submitted its application amendment on November 2d, seven days before this order became effective, and David Laustsen submitted his application amendment on November 12th, three days after this Rule Making order became effective, we presume that in both instances, the term "construction permit" means a conditional license. We note that the written assignment agreement of David Laustsen stipulates that Northern Electric purchased "[a]ll right, title, and interest that David Laustsen may have in and to an MMDS *license* or application . . . ." (emphasis added).

[3] Section 21.30(c) of the Commission's Rules, 47 C.F.R. § 21.30(c), provides:

> The Commission will consider informal objections, but will not necessarily discuss them specifically in a formal opinion if: (1) The informal objection is filed at least one day before Commission action on the application; and (2) The informal objection is signed by the submitting person (or his representative) and discloses his interest.

[4] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application. And, if the real-party-in-interest information changes while the application is pending, Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, requires that additional or corrected information be submitted.

[5] In Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 50 Fed. Reg. 5983 (Feb. 13, 1985) (hereinafter cited as MMDS Lottery Order), the Commission declined to require each applicant to file a real-party-in-interestcertification. The Commission concluded that a real-party-in-interest certification would only duplicate the applicant's statements made in response to application questions 20 and 25(b). However, the Commission emphasized that MMDS real-party-in-interestissues would be reviewed thoroughly, on a case-by-case basis, at an appropriate time in the application process. *Id.* at 5986-87.

[6] This is not a gratuitous action by Northern Electric, such as, providing assistance in completing an application form, without compensation. Northern Electric did agree to pay consideration to David Laustsen and Broadcast Data Corporation. *See* Sumiton Broadcasting Co., 15 FCC 2d 400, 405 (Rev.Bd.1968); *see also* Mobile Phone of Texas, Inc., 52 Rad. Reg. 2d 1455, 1458-59 (1982).

[7] Northern Electric (not David Laustsen, nor Broadcast Data Corporation) would solicit subscribers, pay operating expenses, and receive any profit. Northern Electric has already assumed the responsibility for application expenses incurred in the past. For example, the statement of August 31, 1987 from E. Harold Munn, Jr. & Associates, Inc. for engineering services for an Aberdeen MMDS application was not directed to David Laustsen, but instead was directed to Northern Electric. It would appear that Northern Electric will be responsible for curing any application deficiencies if such an opportunity is provided pursuant to the qualification review. The two amendments were not submitted by counsel purporting to represent either David Laustsen or Broadcast Data Corporation, but were submitted by counsel representing Northern Electric. It appears that Northern Electric has undertaken the duty to amend the two applications, and therefore, could be expected to undertake further application amendments as well. We also note that the written assignment

agreement of David Laustsen specifies that Northern Electric will pay any application expenses incurred by David Laustsen as of August 14, 1987, including expenses David Laustsen incurred for the assignment to Northern Electric. Frequently, more expenses for an MMDS application are incurred, for site leases and interference analysis, for example, after, rather than before, qualification review begins. And the statement of September 30, 1987 from E. Harold Munn, Jr. & Associates, Inc. to Northern Electric for "telephone consultations re carrier frequencies" indicates that employees of Northern Electric already are consulting with professional engineers concerning one of the Aberdeen applications. Therefore, Northern Electric could be expected to pay for any further engineering services required pursuant to qualification review.

[8] Northern Electric (not David Laustsen, nor Broadcast Data Corporation) would have a duty pursuant to Section 21.902 of the Commission's Rules to avoid harmful interference to other stations, for example.

[9] Although the applicants could argue that the transfer of control is prospective in nature, it is clear from the information furnished concerning the assignment agreements that Northern Electric is presently the real-party-in-interest.These amendments may have been structured in this manner as an attempt to avoid a determination that there is a violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), the one-to-a-market rule. *See* MMDS Lottery Order, 50 Fed. Reg. at 5987. In KOWL, Inc., 49 FCC 2d 962, 964-65 (Rev.Bd. 1974), the Review Board, in deciding a real-party-in-interest issue,found a "readily apparent motive" to be significant. In terms of the real-party-in-interestissue, the readily apparent motive for these Aberdeen applications is circumventionof the one-to-a-market rule. This adds weight to the conclusion that Northern Electric is the real-party-in-interest.

[10] Despite the language of the application amendments, we note that in the letter of November 15, 1987, the Mayor of Hecla, South Dakota requests that the Commission grant the license application of Northern Electric, not grant of the applications of David Laustsen and Broadcast Data Corporation. Earlier, a statement from the Law Offices of Marmet and McCombs dated August 14, 1987 requests payment for advicacquisition " (emphasis added) and was sent not to David Laustsen, but to Northern Electric. Also, the statement of E. Harold Munn, Jr. & Associates dated August 31, 1987 requests payment for engineering services to "modify MMDS for group E channels *for new ownership* " (emphasis added) and was directed to Northern Electric, not David Laustsen, as was the statement of September 30, 1987 for "telephone consultations re carrier frequencies."

[11] The term "construction permit" is interpreted to mean a conditional license. *See* n.2 *supra*.

[12] Section 21.901(d)(2) of the Commission's Rules provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channel will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[13] Section 21.19 provides *inter alia* :

> A request for waiver shall contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that: (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[14] Section 21.13(g) provides:

> Whenever an individual applicant, or a partner (in the case of a partnership) or a full time manager (in the case of a corporation) will not actively participate in the day-to-day management and operation of proposed facilities, the applicant or licensee will submit a statement containing the reasons therefor and disclosing the details of the proposed operation, including a demonstration of how control over the radio facilities will be retained by the applicant. If the operation of a radio station is to be accomplished by contractual arrangement with an entity unrelated to an applicant or licensee, the applicant or licensee shall file a copy of the agreement or contract which shall demonstrate that: (1) The operation is accomplished according to general instructions provided for by the applicant; (2) The applicant retains effective control over the radio facilities and their operations; and (3) The applicant assumes full responsibility for both the quality of service and for contractor compliance with the Commission's Rules.

[15] Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a), would permit David Laustsen and Broadcast Data Corporation to amend their applications without a demonstration of good cause because their applications have not been designated for hearing, have not been designated for comparative evaluation, and have not been tentatively selected by a random selection process, " *provided, however, that the amendments shall comply with the provisions of § 21. 29 as appropriate.* " (emphasis added.)

[16] In fact, it would have been impossible to make such a demonstration in view of the fact that each failed to comply with the provisions of Section 21.29.

[17] *See* Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[18] Section 21.29(a) provides:

> Except as provided in paragraph (b) of this section [on non-compensatory engineering agreements to resolve frequency conflicts], applicants or any other parties in interest to pending applications shall comply with the provisions of this section whenever: (1) They participate in any agreement (or understanding) which involves any consideration promised or received, directly or indirectly, including any agreement (or understanding) for merger of interests or the reciprocal withdrawal of applications; and (2) The agreement (or understanding) may result in either: (i) A proposed substantial change in beneficial ownership or control (*de jure* or *de facto)* of an applicant such that the change would require, in the case of an authorized station, the

filing of a prior assignment or transfer of control application under section 310(d) of the Communications Act of 1934 [47 U.S.C. 310(d)] . . . .

[19] Section 21.29(d)(2) requires *inter alia* that:

> . . . Such submission [of a copy of the agreement] shall be accompanied by the certification by affidavit of each principal to the agreement declaring that the statements made are true, complete and correct to the best of their knowledge and belief, and are made in good faith.

[20] Sanctions are imposed on the applications of applicants or other interested parties who attempt to circumvent this requirement of prior approval. Section 21.29(c) provides *inter alia* : "Failure of the parties to comply with the procedures of this section shall constitute a defect in those applications which are involved in the agreement and remain in a pending status." Applications defective for any reason are subject to dismissal pursuant to Section 21.26 of the Commission's Rules, 47 C.F.R. § 21.26. In addition, Section 21.28(d) of the Commission's Rules, 47 C.F.R. § 21.28(d), provides *inter alia* : "Dismissal . . . may be with prejudice for unsatisfactory compliance with § 21.29 . . . ."

[21] In that same Rule Making, the Commission stated that one of the underlying purposes for adoption of Section 21.29 was to "assure the public of an opportunity to comment on ownership changes as they specifically relate to individual applications for new stations." 1976 Part 21 Rule Making Order, 38 Rad. Reg. at 374.

[22] There are no longer any pending MMDS applications that propose to provide service to Aberdeen, South Dakota. Accordingly, pursuant to Sections 21.901(d)(4), 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 21.901(d)(4), 0.91 and 0.291, we will accept new applications to provide MMDS at Aberdeen, South Dakota during a filing period which commences on the day after the release date of this order.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-298**

In re Applications of

ARMANDO GARCIA — File No. BPH-840629IA
Guadalupe, California

REIMER BROADCASTING LIMITED — File No. BPH-840629II
Guadalupe, California

For Construction Permit for
New FM Station

**ERRATUM**

**Released: April 13, 1988**

The *Decision*, FCC 88R-15, released March 7, 1988, is computer garbled and is, therefore, corrected as follows:

Paragraph 14, line 6 of the quotation, change " *seee. g.* " " *see e. g.* "

Paragraph 15, lines 19-20, the eleven words beginning with "or" and ending with "in" should not be italicized.

BY DIRECTION OF THE REVIEW BOARD

Allan Sacks
Chief for Law

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-87**

In re Applications of

| | |
|---|---|
| WORD OF LIFE MINISTRIES, INC. | File No. BPCT-861029KY |
| SHREVEPORT COMMUNITY TELEVISION | File No. BPCT-861216IC |
| G & D COMMUNICATIONS, INC. | File No. BPCT-8612169L |

For Construction Permit
for a New Television Station
Shreveport, Louisiana

**ORDER**

**Adopted: March 17, 1988; Released: April 13, 1988**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN

1. By *Memorandum Opinion and Order*, FCC 87M-3374, released December 28, 1987, the Presiding Judge approved a settlement agreement in this proceeding and granted the application of Word of Life Ministries, Inc. Now before the Review Board is a pleading styled "Application for Review," filed by Wesley Godfrey, which was informally referred to this office on February 4, 1988. [1] Godfrey, whose application was dismissed by the Commission's Fee Section on August 7, 1987, for failure to pay the required hearing fee, and whose petition for reconsideration was denied by the Managing Director on November 30, 1987, submits that he filed an application for review with the Commission of these actions on December 30, 1987, and that the Judge's settlement order herein should be modified to specify that it is contingent upon final disposition of his application for review of the Managing Director's action.

2. It is unnecessary to accord the relief requested by matter of law and practical Commission policy, a grant in this proceeding cannot become final until the pending application for review filed with the Commission is also adjudicated. *See* , 47 U.S.C. 155(c)(4)-(6). Godfrey's relief, if any, must await the Commission's action. *See generally Meridian Communications*, 2 FCC Rcd 7100 (Rev. Bd. 1987)(as a practical matter, finality must await Commission reconsideration); *Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987)(same principle applied to different applicant).

3. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed January 28, 1988 by Wesley Godfrey IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**FOOTNOTE**

[1] Godfrey's pleading was originally filed with the Commission on January 28, 1988.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

RKO GENERAL, INC. (KHJ-TV)
Los Angeles, California

**Docket No. 16679**
File No. BRCT-58

For Renewal of Broadcast License

FIDELITY TELEVISION, INC.
Norwalk, California

**DOCKET NO. 16680**
File No. BPCT-3655

For Construction Permit for New Television Broadcast Station

**ORDER**

**Adopted: March 21, 1988; Released: March 30, 1988**

By the Commission:

1. The Commission has before it: (1) a Partial Supplemental Initial Decision by Administrative Law Judge Edward J. Kuhlmann, *RKO General, Inc. (KHJ - TV)*, 2 FCC Rcd 4807 (I.D. 1987), concluding that RKO General, Inc. is disqualified as the licensee of KHJ-TV, Los Angeles, California and 13 other radio and television stations; (2) Exceptions filed October 19, 1987 by RKO and replies filed December 11, 1987 by Fidelity Television, Inc., Adwave Company et al.,[1] and the Mass Media Bureau, and December 14, 1987 by Future Broadcasting, Inc.; (3) Contingent Exceptions filed October 20, 1987 by Fidelity and Adwave and a reply filed December 11, 1987 by RKO; and (4) the Request of RKO General, Inc. for Oral Argument filed December 18, 1987.

2. IT IS ORDERED:

(a) That oral argument IS SCHEDULED before the Commission en banc on April 28, 1988 at 9:00 a.m.

(b) That, subject to the filing of a written notice of intention to appear and participate within 15 days from the release date of this order, the parties ARE AUTHORIZED to present oral argument as follows:

RKO General, Inc. – 60 minutes
Fidelity Television, Inc.
Adwave Company et al.
Future Broadcasting, Inc.
Chief, Mass Media Bureau
– total of
60 minutes

(c) That RKO General, Inc., MAY RESERVE part of its time for rebuttal.

(d) That the oral argument shall continue until completed, the remainder being rescheduled for another day, if necessary.

(e) That Fidelity Television, Inc., Adwave Company et al., Future Broadcasting, Inc., and the Chief Mass Media Bureau SHALL NOTIFY the Commission within 15 days from the release date of this order as to how they will allocate their 60 minutes among themselves.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

**FOOTNOTE**

[1] Adwave Company, Boston Radio Corporation, East Lake Communications, Inc., Magna Media Corporation, and Potomac Broadcasting Corporation.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Earth Station Antennas that are not in Conformance with the Sidelobe Requirements of 47 C.F.R. § 25.209

## DECLARATORY ORDER

**Adopted: March 31, 1988; Released: April 12, 1988**

By the Chief, Domestic Facilities Division:

1. It has come to our attention that there is some confusion regarding licensing requirements for earth station antennas that do not meet the antenna performance standards prescribed in Sections 25.209(a) and 25.209(b) of the Commission's rules.[1] The purpose of this *Declaratory Order* is to clarify the provisions for licensing nonconforming antennas pursuant to 25.209(f).[2]

2. When the Commission reduced orbital spacing to $2^0$ in 1983, [3] it revised Sections 25.209(a) and (b) of the rules to include more stringent sidelobe standards for transmitting earth station antennas. On reconsideration,[4] the Commission clarified that antennas not meeting these requirements could nevertheless be licensed under certain circumstances. It stated that:

> [A newly authorized antenna] must meet the strict sidelobe standard defined in 47 C.F.R. §§ 25.209(a) and (b) or, in the alternative, demonstrate that its operation fully complies with 2' spacing. In making such a demonstration, *the operator must show that it has taken affirmative steps to overcome the failure of the antenna to meet the sidelobe standard.*[5]

This alternative to strict compliance with the sidelobe standards was codified in Section 25.209(f) of the rules.

3. Thus, for example, in *Equatorial Communication Services*, 2 FCC Rcd 4153 (1987), we authorized Equatorial to operate a limited number of non-compliant 3.0 and 3.4 meter antennas based on Equatorial's demonstration that the antennas would not cause unacceptable interference and that reasonable, though unsuccessful, efforts were made to procure antennas that met the sidelobe standards.

4. Accordingly, as part of the demonstration under Section 25.209(f) that unacceptable levels of interference will not be caused under conditions of uniform 2' spacing, applicants must demonstrate that they have attempted to obtain an antenna that meets the sidelobe standards in Sections 25.209(a) and (b). Applications proposing nonconforming antennas under Section 25.209(f) will be deemed unacceptable for filing unless the applicant has included a statement regarding its efforts to procure a compliant antenna.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

### FOOTNOTES

[1] 47 C.F.R. §§ 25.209(a), (b).

[2] 47 C.F.R. § 25.209(f). Under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Commission may, on its own motion, issue a declaratory ruling to remove uncertainty.

[3] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983).

[4] FCC 84-487 (released January 9, 1985).

[5] Id. at para. 22 (footnotes omitted; emphasis added).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

US SPRINT COMMUNICATIONS COMPANY — File No. I-T-C-88-068

Application for authority to resell switched message telephone services between the U.S. and various overseas points

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: March 31, 1988; Released: April 12, 1988**

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on January 15, 1988 by US Sprint Communications Company (US Sprint), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on February 10, 1988. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed service. US Sprint is already providing various international and domestic communications services. It now proposes to resell international switched voice service in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by US Sprint.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-068 IS GRANTED and US Sprint is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC No. 1 (or any successor tariff of AT&T), between the U.S. Mainland and those points listed in AT&T's tariffs which are not currently served by US Sprint.

5. Copies of any operating agreements entered into between US Sprint and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that US Sprint shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-87-099

For authority to establish and operate satellite channels of communication between points in the United States and points in Canada and Mexico.

HTRC JOINT VENTURE — File No. I-T-C-88-009

For authority under Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and Mexico and the United States and Canada via the Morelos, ANIK and US domestic satellites.

HTRC JOINT VENTURE — File No. CSG-88-015-ML

For authority to operate a transportable domestic fixed satellite transmit/receive earth station for the provision of service between United States, Canada and Mexico.

VIDEOCOM, INC. — File No. I-T-C-88-020

For authority under Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication for the provision of two-way services between the United States and Canada via domestic satellites and the ANIK satellite system.

VIDEOCOM, INC. — File No. 6107-DSE-MP/L-87

For modification of license for a transmit/receive earth station, call sign E873008, at Dedham, Massachusetts for the provision of service between the United States and Canada.

DALLAS/FORT WORTH TELEPORT, LTD. — File No. I-T-C-88-051

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and certain transborder locations.

DALLAS/FORT WORTH TELEPORT, LTD. — File No. 783-DSE-MP/L-88

For modification of a domestic fixed-satellite earth station, call sign E8972, at Dallas, Texas to add points of communication to Canada and Mexico.

GTE SPACENET CORPORATION — File No. CSG-88-007-ML

For authority to operate a fixed transmit/receive earth station, call sign E865135, at Wheeling, Illinois for the provision of service between the United States and Canada.

CONUS COMMUNICATIONS COMPANY, L.P. — File No. CSG-88-016-ML

For authority to constuct and operate a transmit/receive earth station at Washington, D.C. (east antenna) for the provision of service between the United States and Canada.

CONUS COMMUNICATIONS COMPANY, L.P. — File No. CSG-88-017-ML

For authority to construct and operate a transmit/receive earth station at Washington, D.C. (west antenna) for the provision of service between the United States and Canada.

CONUS COMMUNICATIONS COMPANY, L.P. File No. 787-DSE-ML-88

For modification of license of fixed transmit/receive earth station, call sign E8162, at Minneapolis, Minnesota, for the provision service between the United States and Canada.

CONUS COMMUNICATIONS COMPANY, L.P. File No. 786-DSE-ML-88

For modification of license of fixed transmit/receive earth station, call sign E860330, at Minneapolis, Minnesota, for the provision service between the United States and Canada.

ROGERS PORTLAND CABLESYSTEMS LIMITED PARTNERSHIP File No. CSG-88-018-ML

For a permanent construction permit/license for a transmit/receive earth station at Portland, Oregon, for the provision of service between the United States and Canada.

ROGERS CABLESYSTEMS OF THE SOUTHWEST, INC. - CALIFORNIA DIVISION File No. CSG-88-019-ML

For a permanent construction permit/license for a transmit/receive earth station at Garden Grove, California, for the provision of service between the United States and Canada.

PUBLIC BROADCASTING SERVICE File No. 1064-DSE-ML-88

For modification of license for fixed transmit/receive earth station, call sign WD-35, at Alexandria, Virginia, for the provision of service between the United States and Canada.

## MEMORANDUM OPINION, ORDER AND AUTHORIZATION

**Adopted: March 31, 1988; Released: April 12, 1988**

By the Acting Chief, International Facilities Division:

1. The Commission has under consideration the above applications requesting authority under Title III and Section 214 of the Communications Act of 1934, as amended, to provide satellite communication services between the United States, Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. No comments were received.

### THE APPLICATIONS

2. *American Telephone and Telegraph Company (AT&T) (File No. I-T-C-87-099).* AT&T is a common carrier and licensed domestic satellite system operator. AT&T requests authority to use the ANIK and Morelos satellite systems to provide private line business services to Canada and Mexico.[1] AT&T states that it will provide the service over existing facilities and that some customers may be able to use their own private earth stations to access its business service. It maintains that authorization of this service will not cause significant economic harm to INTELSAT since INTELSAT is not carrying a significant amount of private line business traffic in the region. AT&T was authorized in 1986 to provide certain two-way transborder services to Canada and Mexico via its domestic satellite system.[2]

3. *HTRC Joint Venture (HTRC) (File Nos. I-T-C-88-009 and CSG-88-015-ML).* HTRC is a joint venture established to develop a teleport to support the mid-Michigan region. HRTC seeks to be certified as a common carrier through grant of the instant applications. In application File No. I-T-C-88-009, HTRC states that it plans to offer two-way transmission and reception video, audio, teletext and voice message services throughout the United States, Canada and Mexico. HRTC claims that its application calls for satellite services, identical to those previously coordinated through INTELSAT, to points previously approved by the Commission. It will fund the proposed services through an outstanding action grant from the Department of Housing and Urban Development. In application File No. CSG-88-015-ML, HTRC seeks authority under Title III to construct and operate a 3.7 meter Ku-band temporary-fixed domestic satellite transmit/receive earth station at East Lansing, Michigan to carry the services proposed above.

4. *Videocom, Inc. (Videocom) (File Nos. I-T-C-88-020 and 6107-DSE-MP/L-87).* Videocom is a licensed domestic common carrier in the business of delivering video and associated audio transmission services. It holds five licenses to operate transportable and fixed domestic fixed-satellite earth stations and associated point-to-point microwave facilities. In application File No. I-T-C-88-020, Videocom proposes to extend its existing video and associated audio services to and from Canada via domestic satellites and the ANIK satellite system. It has been providing service between the U.S. and Canada on an *ad hoc* basis for several years. Videocom will use its existing communications facilites to provide the proposed services. It claims that its application raises no new legal or policy considerations and does not require additional policy input or review by the Department of State. In application File No. 6107-DSE-MP/L-87, Videocom requests modification

of its license for a 9.2 meter C-band transmit/receive earth station at Dedham, Massachusetts (E873008) to communicate with the ALSAT and ANIK satellites.

5. *Dallas/Fort Worth Teleport, Ltd (DFWT) (File Nos. I-T-C-88-051 and 783-DSE-MP/L-88).* DFWT is a non-dominant common carrier. In application File No. I-T-C-88-051, DFWT seeks authority to use its existing common carrier earth station and related facilities with the ANIK, Morelos and approved U.S. domestic systems to extend its transmission and reception services to Canada and Mexico and its receive only services to all transborder locations that have been consulted pursuant to Article XIV(d) of the INTELSAT Agreement. It states that the proposed services are intended for use in areas where landline or alternate common carrier service is unavailable or cost-prohibitive. In application File No. 783-DSE-MP/L-88, DFWT requests modification of its license for the 9.1 and 9.2 meter C-band domestic fixed-satellite earth station at Dallas, Texas (E8972) to add the ANIK and Morelos satellites as points of communication.

6. *GTE Spacenet Corporation (GTE) (File No. CSG-88-007-ML).* GTE is a common carrier and licensed domestic satellite system operator. GTE requests amendment of its pending application to operate a 3.7 meter Ku-band transmit/receive earth station at Wheeling, Illinois (E865135) to add Canadian ANIK satellites as points of communication for U.S. - Canadian traffic. It currently operates the facility under a grant of Special Temporary Authority.

7. *Conus Communications Company, L. P. (Conus) (File Nos. CSG-88-016-ML, CSG-88-017-ML, 787-DSE-ML-88* and *786-DSE-ML-88).* Conus is a broadcast licensee. In application File No. CSG-88-016-ML, Conus seeks authority to construct and operate a 4.6 meter Ku-band transmit/receive satellite earth station at Washington, D.C. (east antenna) to provide video and related audio services between Washington, D.C. and points in the United States and Canada. Conus intends to utilize all domestic U.S. satellites and the Canadian ANIK satellite system. Application File No. CSG-88-017-ML, is a request for authority to construct and operate a 4.6 meter Ku-band transmit/receive satellite earath station at Washington, D.C. (west antenna) for the provision of similar services. In application File No. 787-DSE-ML-88, Conus seeks modification of its license for a 5.5 meter Ku-band satellite transmit/receive earth station at Minneapolis, Minnesota (E8162) to add points of communication to Canada. Application File No. 786-DSE-ML-88 is a request for modification of its license for a 4.6 meter Ku-band transmit/receive earth station (E860330), Minneapolis, Minnesota, to add points of communication to Canada.

8. *Rogers Portland Cablesystems Limited Partnership (Rogers - Portland) (File No. CSG-88-018-ML).* Rogers-Portland owns and operates the cable television system serving Portland, Oregon. Rogers-Portland is seeking a permanent construction permit/license for a 2.4 meter Ku-band transmit/receive earth station facility at Portland, Oregon. The facility is currently operating pursuant to Special Temporary Authorization. Rogers-Portland plans to use the Portland earth station for two-way communications with its data center in Toronto, Ontario, Canada. It intends to utilize all Ku-band U.S. domestic satellites and the Canadian ALSAT system.

9. *Rogers Cablesystems of the SouthWest, Inc. - California Division (Rogers - California) (File No. CSG-88-019-ML).* Rogers-California owns and operates the cable television systems serving Garden Grove, California. In its application, Rogers-California requests permanent construction permit/license for a 2.4 meter Ku-band transmit/receive earth station facility at Garden Grove, California. It is presently operating this facility under a grant of Special Temporary Authority. The primary purpose of Rogers-California's request is to enable it to provide two-way communication between its Garden Grove earth station and its data center in Toronto, Ontario, Canada. It plans to communicate via all Ku-band U.S. domestic satellites and the Canadian Alsat system.

10. *Public Broadcasting Service (PBS) (File No. 1064-DSE-ML-88).* PBS requests modification of its license for the 9.2 and 11 meter C-band domestic fixed satellite earth station (WD-35), Alexandria, Virginia, to enable PBS to transmit and receive video and audio services from Canada. PBS requests authority to communicate with ANIK satellites D1, C2, A3 and C3.

## DISCUSSION

11. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. The Commission stated that applications meeting this standard could not be implemented until: 1) the concurrence of the appropriate governmental entities had been obtained; 2) the consultation requirement of INTLESAT Article XIV(d) had been fulfilled; and 3) the Chief, Common Carrier Bureau issued an order authorizing implementation of service. In its *Transborder I* decision, [3] the Commission concluded that where a domestic satellite network is already in place that can be accessed in a transborder location with the addition of a small, receive-only earth station, it would be uneconomical and impractial for that country to utilize the INTELSAT system when it can reach the domestic network for little or no cost. The alternative method of using INTELSAT facilities would involve significant additional costs due to multi-satellite hops and the use of additional terrestrial facilites. In addition, the Commission found that the use of the INTELSAT system to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum.

12. The Commission made similar findings with respect to the business services between the U.S. and Canada. The Commission noted that the global system has not been used for traffic between the U.S. and Canada. It found that service via INTELSAT would be uneconomical and impractical since it would involve 1) higher costs necessary to duplicate networks already in place; 2) higher costs and inefficiency associated with multi-satellite hops and terrestrial links which would be required to extend transmission to a customer's premises; and 3) an inefficient use of the available radio spectrum.

13. The proposals before us are similar, if not identical, to the many applications found to be in accord with the Commssion's transborder policy. Even though INTELSAT may be able to provide the instant services, the applications involve extensions of existing transborder services

which would be uneconomical and impractical to duplicate via INTELSAT. They are consistent with current INTELSAT Article XIV(d) consultations and therefore will cause neither technical interference nor significant economic harm to the global system. Since all prerequisites for the issuance of final authorizations have been completed, we conclude that grant of these applications will serve the public interest.

14. Accordingly, IT IS ORDERED that the applications of AT&T (File No. I-T-C-87-099), HRTC (File Nos. I-T-C-88-009 and CSG-88-015-ML), Videocom (File Nos. I-T-C-88-020 and 6107-DSE-MP/L-87), DFWT (File Nos. I-T-C-88-051 and 783-DSE-MP/L-88), GTE (File No. CSG-88-007-ML), Conus (File Nos. CSG-88-016-ML, CSG-88-017-ML, 787-DSE-ML-88, and 786-DSE-ML-88), Rogers-Portland (File No. CSG-88-018-ML), Rogers-California (File No. CSG-88-019-ML) and PBS (File No. 1064-DSE-ML-88) ARE GRANTED consistent with Attachments 1 and 2, and may be implemented without any further action by the Commission.

15. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

16. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

17. This order is issued under Section 0.291 of the Commission's Rules on Delegations of Authority and is subject to review under Section 1.115 of the Rules on Practice and Procedure. Review by the full Commission may be requested within 30 days of the date of public notice of this order (see Commission Rule 1.4(b)(2)) by writing Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail in time to be received by the due date.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] In application File No. I-T-C-87-099, AT&T also requested authority to provide two-way business services between the United States and certain points in the Caribbean region, and Central and South America. Pan American Satellite (PAS) filed a Petition to Deny this portion of AT&T's application and the Communications Satellite Corporation (Comsat) filed comments. By letter dated January 19, 1988, AT&T requested that the Commission bifurcate consideration of its application and grant authorization for that portion which seeks authority to provide two-way business services to Canada and Mexico. No party has objected to AT&T's request for bifurcation or opposed the limited service to be provided under this request. Accordingly, we grant AT&T's request for bifurcation and will consider only that portion of the application seeking authorization for service to Canada and Mexico.

[2] American Telephone and Telegraph Co. et. al., File Nos. I-T-C-86-105, et. al., DA 86-26 released Oct. 9, 1986.

[3] Transborder Satellite Video Services, 88 F.C.C. 2d 258 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 12, 1988

## SOUTHWESTERN BELL AND AMERITECH FILE REVISIONS TO COST ALLOCATION MANUALS; PUBLIC COMMENT INVITED

On March 29, 1988, Southwestern Bell Telephone Company (Southwestern Bell) filed revisions to its Part 64 cost allocation manual for the separation of regulated and nonregulated costs. The Ameritech Operating Companies (Ameritech) filed manual revisions on March 30, 1988. The original manuals were filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manuals on December 28, 1987, conditional upon the filing of numerous specified revisions. *See Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation* of Regulated and Nonregulated Costs, 3 FCC Rcd 447 (1988); Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988).

Comments on the revisions to the Southwestern Bell and Ameritech manuals may be filed (in separate pleadings) no later than **May 11, 1988.** Replies should be filed by **May 26, 1988.** Comments should reference the following file numbers:

Southwestern Bell AAD 7-1694
Ameritech AAD 7-1688

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in Room 812, 2000 L St., N.W., Washington, D.C. 20554.

For further information contact Jane Jackson at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition to Amend Section
97.113(d)(2) of the Commission's
Rules to Impose a Time Limit on
Information Bulletins.

**ERRATUM**

**Released: April 12, 1988**

The Order in the above captioned proceeding (DA 88-372), released April 1, 1988 is corrected to change the adoption date from March 8, 1988, to March 17, 1988.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

NECA's Proposed Revisions to
the Average Schedules for 1988

**ORDER**

**Adopted: April 4, 1988; Released: April 12, 1988**

By the Chief, Common Carrier Bureau:

1. On June 30, 1987, the National Exchange Carrier Association, Inc. (NECA) proposed revisions to the average schedules that, if approved, would have had an effective date of January 1, 1988. In an Order released December 21, 1988,[1] the Commission declined to accept NECA's proposed revisions, provided corrective guidelines, and directed NECA to file proposed revisions, consistent with that Order, no later than May 2, 1988, with an effective date of October 1, 1988.[2] On February 22, 1988, NECA filed a petition requesting that the time for filing proposed revisions to the average schedules be extended to October 1, 1988, with an effective date of January 1, 1989.

2. NECA states that additional time will be needed to "complete the statistical data collection program and to secure the additional data necessary for accurate estimations" [3] that fully reflect the extensive changes in Part 69 of the Commission's Rules and the Tax Reform Act of 1986. NECA also believes that developing and filing formulas prior to October 1, 1988 would severely jeopardize the accuracy of the resulting formulas and could produce results that might otherwise be inconsistent with the Commission's rules.[4]

3. Although it is the policy of the Commission that extensions of time shall not be granted routinely,[5] we believe that an extension of time will serve the public interest in this case. NECA has made a reasonable showing that an extension of time will facilitate the development of average sechedule formulas that will comply with the Commission's Order.

4. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that NECA shall file proposed revisions to the average schedules on October 3, 1988, with a proposed effective date of January 1, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] NECA's Proposed Revisions to the Average Schedules for 1988, Memorandum Opinion and Order; 3 FCC Rcd 172 (1988).

[2] This filing will supplant the certification or revisions that otherwise would be required by July 1, 1988 pursuant to Section 69.606(b) of the Commission's rules. *See* 47 C.F.R. § 69.606(b) (1986).

[3] Petition at 2.

[4] *Id.*

[5] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-148**

In the Matter of

Amendment of Section 73.606(b), RM-4931
Table of Allotments,
TV Broadcast Stations.
(Grand Junction, Colorado)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 15, 1988; Released: April 11, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 51 Fed. Reg. 16078, published April 30, 1986, proposing the allotment of VHF television Channel 13 to Grand Junction, Colorado, as a fifth local television service.[1] KOB-TV, Inc., filed comments in this proceeding. Rocky Mountain Communications Network, Inc., and Stauffer Communications, Inc., filed comments along with motions for late acceptance. W. Russell Withers, Jr., licensee of television Station KREX-TV, Grand Junction, Colorado, filed comments and a counterproposal. KOB-TV, Inc. and Contemporary Communications filed reply comments.

**COMMENTS**

2. As stated in the *Notice*, the proposed Channel 13 allotment would require a site restriction of 12.3 miles south of Grand Junction to avoid a short-spacing to the licensed facilities of Station KWWY-TV, Channel 13, Rock Springs, Wyoming. In its comments, Rocky Mountain Communications Network, Inc. (Rocky Mountain), former licensee of Station KWWY-TV (now KGWR-TV), refers to its pending application to relocate the Station KWWY-TV transmitter site (File No. BPCT-860418KG). In this connection, Rocky Mountain contends that since its application was filed 5 days before the release of the *Notice*, the application should be granted notwithstanding the rule making proceeding.

3. Stauffer Communications, Inc. (Stauffer) is the present licensee of Station KGWR-TV. In its comments, Stauffer refers to the ongoing technical difficulties with its current licensed facilities and the fact the proposed relocation could provide a first Grade B television service to approximately 28,000 persons. Stauffer also suggests that an additional site restriction on the proposed Grand Junction allotment would eliminate the short-spacing between a Grand Junction allotment and the proposed Station KGWR-TV transmitter site relocation.

4. In his comments, W. Russell Withers, Jr. (Withers) refers to the fact that the proposed channel would be the fifth allotment to a community with only 55,800 ADI TV households according to Arbitron.[2] In addition to questioning the economic viability of the proposed allotment, Withers notes that KOB-TV, Inc., intends to use the channel in Grand Junction as a satellite of Station KOB-TV, Albuquerque, New Mexico. In this vein, Withers refers to the 300 mile separation between Grand Junction and Albuquerque and the related costs necessary to relay the KOB-TV signal to Grand Junction. For this reason, Withers urges the Commission to require KOB-TV, Inc. to establish its financial ability at the rule making stage to undertake such a proposal. Withers also includes an engineering statement indicating that due to the proposed 12.3 mile site restriction to protect Station KGWR-TV, Grand Junction would be subject to shadowing unless the ultimate permittee of Channel 13 would construct a tower of approximately 800 feet. Finally, Withers advances a counterproposal in which existing vacant Channel *18 in Grand Junction, currently reserved for noncommercial educational use, would be released for commercial use and Channel 13 would be allocated to Grand Junction and reserved for noncommercial educational use.

5. In its comments, KOB-TV, Inc. affirms its intention to apply for the proposed channel as a satellite for Station KOB-TV. In reply comments to the comments and counterproposal of Withers, KOB-TV, Inc. states that the appropriate time to consider the cost of constructing a satellite station would be in connection with the construction permit application. Secondly, KOB-TV, Inc. notes that the application to relocate the KGWR-TV transmitter site was filed 9 days after the adoption of the *Notice* and three months after it amended its then pending petition for rule making to specify Channel 13. Thus, KOB-TV, Inc. asserts that the KGWR-TV application is in conflict with the rule making petition and cannot be granted. KOB-TV, Inc. also argues that the KGWR-TV application cannot be properly considered in this proceeding because it was not served on KOB-TV, Inc. and thus constitutes a prohibited *ex parte* presentation. Finally, KOB-TV, Inc. asserts that the Withers counterproposal is defective because there has been no expression of interest in applying for noncommercial educational VHF Channel 13 allotment or a commercial UHF Channel 18 allotment. In regard to the late filed Stauffer comments, KOB-TV, Inc. reiterates its arguments that the KGWR-TV application cannot be considered in this proceeding. Furthermore, KOB-TV, Inc. also objects to any increase in the already proposed 12.3 mile site restriction to accommodate a site change by Station KGWR-TV.

6. In reply comments, Contemporary Communications[3] states that Withers has failed to offer any valid reasons why Channel 13 should not be allotted and the counterproposal is defective because there is no expression of interest in either the proposed noncommercial educational Channel 13 allotment or the commercial Channel 18 allotment.

**DISCUSSION**

7. We will accept the late filed comments by Rocky Mountain and Stauffer. The gravamen of both pleadings is the effect the proposed Channel 13 allotment would have on the application to relocate the Station KGWR-TV transmitter site. KOB-TV, Inc. is correct in noting that this application was not served on the other parties in this proceeding. However, this application is a matter of public record and was on file prior to the release of the *Notice*. As such, consideration of the application in this proceed-

ing would not contravene our *ex parte* rules. Furthermore, this application was referenced in the timely comments by Withers which were served on all parties in this proceeding. In turn, KOB-TV, Inc. filed reply comments directly pertaining to the issue of what consideration should be given in this proceeding to the pending KGWR-TV application. We believe that consideration of the late filed comments would provide us with a complete record in this proceeding and would not prejudice any party or delay resolution.

8. After careful consideration of this matter, we will allot an alternate channel, Channel 11, to Grand Junction.[4] This channel can be allotted with a "plus" offset and a site restriction 6.5 miles northwest.[5] It should also be noted that Channel 11 was the channel originally proposed by KOB-TV, Inc. A Channel 11 allotment will reduce the site restriction and enable us to grant the pending application to relocate the KGWR-TV transmitter site. In addition, the opposition comments filed by Rocky Mountain and Stauffer and the argument by Withers with respect to shadowing resulting from the originally proposed 12.3 mile site restriction are now moot.

9. The other opposition arguments advanced in this proceeding do not warrant withholding this allotment. First, the argument that the Grand Junction economy cannot support an additional television outlet does not justify denying this rule making proposal. The proper forum to consider such economic arguments would be in the context of an individual application and not this rule making proceeding.[6] *See Grand Junction, Colorado*, 26 RR 2d 513 (1973); see also *Hagerstown, Maryland*, 52 RR 2d 1476 (1982). Similarly, a rule making proceeding is not the appropriate forum to consider the issue of satellite operation or the overall costs of constructing a satellite station. Considering such issues at the application stage is more conducive to the efficient transaction of Commission business. This determination is reinforced by the fact that it is premature to conclude that KOB-TV, Inc., proposing a satellite television outlet, will be the eventual permittee of this channel.

10. Finally, we agree with KOB-TV, Inc. and Contemporary Communications that the counterproposal advanced by Withers is defective. There has been no expression of interest in either a commercial UHF Channel 18 allotment or noncommercial educational use of VHF Channel 13. Accordingly, this counterproposal will be dismissed.

11. Pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 23, 1988,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, as follows:

| City | Channel No. |
|---|---|
| Grand Junction, Colorado | 4+, 5-, 8-, 11+, *18+ |

12. IT IS FURTHER ORDERED, That the aforementioned counterproposal by W. Russell Withers, Jr. IS DISMISSED.

13. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to: Brigham Young University, Station KBYU-TV, C-302, HFAC, Provo, Utah, 84602.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] KOB-TV, Inc., petitioner for the Channel 13 allotment, originally requested Channel 11 but subsequently amended its proposal to specify Channel 13.

[2] Withers stated that the proposed channel would be the sixth television service. This envisioned allotting both Channel 2 and Channel 4 to Grand Junction in MM Docket 84-892. However, the Channel 2 proposal was dismissed and only Channel 4 was allotted to Grand Junction. *Grand Junction, Colorado*, 2 FCC Rcd 1622 (1987).

[3] Contemporary Communications was the proponent for a Channel 2 allotment in Grand Junction in MM Docket No. 84-892.

[4] This allotment requires a change in offset from "plus" to "minus" by Station KBYU-TV, Provo, Utah, which has already been ordered in MM Docket No. 85-52. 2 FCC Rcd. 6427(1987).

[5] The reference coordinates for this allotment are 39 08' 07" and 108 38' 05". Inasmuch as Grand Junction is located 197.5 miles from Denver, Colorado, this allotment is not subject to the television "freeze" *Order* adopted July 17, 1987, 52 Fed. Reg. 28346, published July 29, 1987.

[6] In a recent action, the Commission abolished the *Carroll* doctrine with respect to the possible economic injury to existing stations that might be caused by the entry of new full service stations. *Report and* Policy Statement in MM Docket No. 87-68, adopted November 24, 1987 (FCC 87-364).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| VICTORY MEDIA, INC. | **MM DOCKET NO. 84-1033** File No. BPCT-840711KF |
| JOHNSON BROADCASTING, INC. | **MM DOCKET NO. 84-1034** File No. BPCT-840711KI |
| LOUISE BRUNSON | **MM DOCKET NO. 84-1035** File No. BPCT-840711KO |

For Construction Permit
for New Television Station
Katy, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 1, 1988; Released: April 12, 1988**

By the Commission:

1. On November 5, 1984, the Commission designated for hearing six mutually exclusive applications for authority to construct a new television station on Channel 51 at Katy, Texas. *Hearing Designation Order,* 49 Fed. Reg. 46,485 (pub. Nov. 26, 1984). Only the applications filed by Johnson Broadcasting, Inc., Victory Media, Inc., and Louise Brunson remain. In a Decision released on March 25, 1987, the Review Board affirmed the Initial Decision of Administrative Law Judge Walter C. Miller (FCC 86D-55, released September 3, 1986), granted the application filed by Johnson, and denied the competing applications filed by Victory and by Brunson. *Victory Media, Inc.,* 2 FCC Rcd 1759 (Rev. Bd. 1987). In doing so, the Board agreed with the ALJ's determination that Brunson is basically unqualified under the air hazard issue. 2 FCC Rcd at 1759-60 ¶¶ 4-5. Turning to the standard comparative issue, the Board determined that Victory is a sham proposal entitled to no comparative credit; that Brunson would not be entitled to any integration credit even if she were basically qualified; and that Johnson, with 100 percent full-time integration credit, is the comparatively superior applicant. 2 FCC Rcd at 1760-61 ¶¶ 8-12, 15.

2. Now before the Commission are: (a) an application for review, filed on April 24, 1987 by Victory; (b) an opposition, filed on May 18, 1987 by Johnson; (c) an application for review, filed on April 24, 1987 by Brunson; (d) an opposition, filed on May 11, 1987, and a supplement thereto, filed on May 19, 1987 by Johnson; and (e) a contingent application for review, filed on May 11, 1987 by Johnson. Johnson's contingent application for review impermissibly incorporates by reference its previously filed brief and exceptions to the Initial Decision. See 47 C.F.R. §§ 1.48(a), 1.115(f); *Adjudicatory Reregulation Proposals,* 58 FCC 2d 865, 875-77 (1976). For this reason, we will be dismiss Johnson's contingent application without further consideration.

3. Having examined the contentions of the parties, we substantially agree with the findings and conclusions of the Board, and we affirm them, except as they are modified below. We affirm the Board's disqualification of Brunson under the air hazard issue, and we do not reach the collateral question of whether Brunson would be entitled to any integration credit if she were basically qualified to be a Commission licensee.

4. We are not persuaded by the record, however, that Victory's integration proposal is a sham. Accordingly, we believe that Victory's 100 percent full-time integration proposal should be fully credited. We therefore remand this proceeding to the Review Board with instructions to evaluate the qualitative aspects of Victory's integration proposal and to determine whether Victory or Johnson is the superior applicant under the standard comparative issue.

5. *Victory's Integration Proposal:* Victory is a corporation with two classes of common stock, voting and non-voting. Virginia Mampre, who proposes to be full-time general manager at the station, owns 100 percent of Victory's voting stock, and has 15 percent of the total equity (voting and non-voting stock combined). The non-voting stock is owned by Ernest T. Sanchez and Susan M. Jenkins, who are husband and wife. Neither has any broadcast experience, and neither proposes to be integrated into management of the station. In fact, both are Washington, D.C. attorneys who do not plan to move to Katy. On the other hand, Mampre has a substantial amount of broadcast experience; and she has lived within the service area of the proposed station since 1977.

6. *Review Board's Decision:* The Review Board concluded that non-voting shareholders Sanchez and Jenkins played a significant role in initiating the application and arranging for its financing. In this regard, the Board found that Sanchez contacted Mampre, suggested two classes of stock, began preparing Victory's application, recommended (and first contacted) Victory's consulting engineer, drafted answers for the application, handled some FAA contacts, secured financing for the station, and proposed paying all of Victory's legal fees. *Decision,* 2 FCC Rcd at 1760-61 ¶ 12. The Board also noted that the other non-voting shareholder, Jenkins, had acted as legal counsel for the applicant until May, 1985, and that Mampre is obligated to invest only $150 in Victory. *Id.*

7. Based on the significant role that Sanchez and Jenkins played in financing and initiating the application, the Board affirmed the ALJ's refusal to award Victory any integration credit. *Id.* at 1760 ¶ 11. In discrediting Victory's integration proposal, the Board also focused upon Victory's "informal legal structure." Noting that Victory has no by-laws, that none of its principals has any stock certificates, and that the certificate of incorporation on file on the "B" cut-off date showed only one class of stock, the Board determined that Victory's ownership structure was a sham not entitled to any integration credit. *Id.* at 1761 ¶ 14.

8. *Discussion:* As an initial matter, the Board's reliance on Sanchez's role in securing financing and initiating the application as evidence in and of itself of a sham application is misplaced. The Commission has indicated that "[f]inancial investment is not necessarily the *sine qua non* of an ownership interest creditable for integration pur-

poses." *KIST Corp.*, 102 FCC 2d 288, 290 (1985), aff'd sub nom. *United American Telecasters v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986). Nor is the role played by the non-voting shareholders in the formation of the applicant necessarily dispositive of whether the applicant, once established as an ongoing business, will be secretly managed by its passive investors. *KIST*, 102 FCC 2d at 291 n.8 ("In light of the clearly *bona fide* nature of the [applicant's] partnership agreement, we are unpersuaded that there is any relevance to the manner in which [the principals] came to enter into [their partnership] agreement.").

9. Here, Sanchez arranged for Victory's financing, and Jenkins initially acted as its legal counsel. When outside counsel was hired to prosecute Victory's application before the Commission, non-voting stockholders Sanchez and Jenkins agreed to pay all of Victory's legal fees. Tr. at 1070. Such services do not relate to broadcasting, and do not indicate that Mampre will have less than exclusive control of the station's management in the future. Importantly, all of Victory's out-of-pocket expenses, except legal fees, were divided equally among Mampre, Sanchez, and Jenkins. Tr. at 902, 1061-62.

10. It was also Sanchez who contacted Mampre about filing for the Katy station. However, Sanchez has known Mampre professionally for about ten years. Tr. at 899, 1067, 1103. In fact, Mampre previously told Sanchez of her interest in applying for a Houston area station. Tr. 899, 1067-68. In this regard, the decision to make Mampre the full-time general manager at the station was the result of discussions over a number of years. Tr. at 1107-08.

11. As the Board found, Sanchez did suggest the voting/non-voting stock structure. *Decision*, 2 FCC Rcd at 1750 ¶ 12. However, Mampre was able to negotiate for herself a higher percentage of equity than Sanchez originally suggested. Tr. at 1109, 1140. More importantly, the equity split reflected the services -- securing financing, acting as legal counsel, and paying legal fees -- that the non-voting stockholders would provide during the prosecution of Victory's application. Tr. at 954, 1070, 1140.

12. The record further reflects that Mampre paid fully for her stock, and that she played an active role in the preparation of Victory's application. In this regard, Jenkins drafted answers to Victory's application while she was on the phone with Mampre. Tr. at 1185-87. As president and sole voting shareholder, Mampre was authorized to pay, and has in fact paid, all corporate expenses out of corporate funds. Tr. at 1058-60. Although Mampre ultimately hired the engineer that Sanchez recommended, she did so only after "explor[ing] several different options on [her] own" and independently exercising her business judgment. Tr. at 1055-56, 891. In addition, she worked closely with the engineer on FAA matters. Tr. at 1093-94. By contrast, Sanchez's only contact with the FAA was limited to making a few status inquiries by phone. Tr. at 898.

13. *Victory's Corporate Structure:* The "informality" of Victory's legal structure does not necessarily mean that Victory's application is a sham. Although the Board found that no stock certificates have been issued, uncontroverted testimony reflects, and the other applicants do not dispute, that the principals have paid fully for their stock. Tr. at 898, 1064. In this regard, Victory is a Delaware corporation whose corporate shares and their ownership are created by payment; stock certificates are merely evidence of the underlying ownership interest, and delivery of the certificates is therefore not essential to ownership. Del. Code Ann. tit. 8, § 158; *Joseph E. Seagram & Sons v. Conoco, Inc.*, 519 F. Supp. 506, 512 (D. Del. 1981) (applying Delaware law); *Haskell v. Middle States Petroleum Corp.*, 165 A. 247 (Del. Super. Ct. 1929).

14. As to the lack of by-laws or other documents outlining how the corporation will operate, the Commission has explained that non-voting stockholders -- unlike limited partners, who must be specifically insulated from general partners -- are by definition prohibited from influencing or controlling corporate activities. See *Attribution of Ownership Interests*, 97 FCC 2d 997, 1020-21 (1984), recon. granted in part, 58 RR 2d 604, 615 (1985), further recon. granted in part, 1 FCC Rcd 802, 803-04 (1986). In the absence of extrinsic evidence that a non-voting stockholder will influence or control the operation of the corporation, we will not conclude that a corporation is a sham simply because it has no written by-laws. Thus, the fact that Jenkins and Sanchez are non-voting stockholders does not end our inquiry as to whether the proposal is a sham. We are nevertheless satisfied that the lack of bylaws is not critical because the limited nature of a non-voting shareholder's corporate interest is well established.

15. A more serious question is raised by Victory's failure to specify two classes of stock in its original certificate of incorporation. As the Board found, the certificate of incorporation on file with the State of Delaware on the B cut-off date specified that Victory would have only one class of stock (voting stock). Its certificate was not amended to reflect two classes of stock until April 17, 1985.

16. However, sworn and unrebutted testimony confirms that Victory's principals always intended for the corporation to have two classes of stock. Tr. at 1115-17, 1131. The record likewise corroborates Victory's claim that it intended all along that Mampre would be the only voting shareholder. Tr. at 1073-78, 1116-17, 1188. In this regard, uncontroverted testimony from all three principals explains that the articles of incorporation mistakenly specified only one class of stock. Tr. at 873-74, 875-76, 921-22, 1198. Moreover, in discrediting Victory's proposal, the ALJ made no demeanor findings that would be entitled to special deference on review. Under these circumstances, the discrepancy in the corporate papers, by itself, is insufficient under Commission precedent to discredit Victory's otherwise valid integration proposal. See *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-95 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd 1259 (1987) (totality of the circumstances, rather than just the fact that the original certificate of incorporation does not provide two classes of stock, must be considered in evaluating the legitimacy of the application).

17. To the extent that the Board relies on the lack of written documentation corroborating the specification of two classes of stock in Victory's application, it would have been useful to have these matters in writing. However, current Commission precedent does not require written documentation of an applicant's ownership structure on the B cut-off date. For example, we have fully credited an integration proposal even though its partnership agreement is not executed until after the time for filing amendments as a matter of right. *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 433-34 (Rev. Bd. 1983), review denied, FCC 84-434 (released Sept. 19, 1984), recon. denied, 57 RR 2d 1483 (1985).

18. The record in this case persuades us that Victory is not a sham application but a good faith proposal. Although we will not hesitate to discredit the integration

proposals of applicants where we are presented with convincing evidence that limited partners or non-voting shareholders are or will be in fact exercising influence or control over the ongoing business, this is not such a case. Here the involvement of the non-voting shareholders was limited to the formation and initial prosecution of the application. That, by itself, does not demonstrate a sham application or who will control the ongoing licensee. Accordingly, we conclude that Victory is entitled to full credit for the full-time integration proposal of 100 percent owner Virginia Mampre.

19. We do not want to deter an applicant from structuring its business proposal in a way that minimizes its cost of capital. Indeed, the existence of an economic rationale for creating a corporation with voting and non-voting stock is clearly relevant to determining whether an applicant's proposed management and ownership structure is a sham. Our primary mandate is to oversee the fair and efficient use of the spectrum, not to oversee an industrial policy for the broadcasting industry. Having no particular expertise in finance or business management, we are reluctant to second-guess an applicant's business judgment -- so long as it is, in fact, a good faith business decision as distingushed from an attempt to structure a sham application. We note that there are legitimate business reasons why an applicant might create a corporation with voting and non-voting classes of common stock. [1] It would, therefore, disserve the public interest to assume that such a scheme is *per se* a sham. Instead, applications will be found to be shams only where there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business.

20. Because the Board determined that Victory's proposal was a sham not entitled to any quantitative integration credit, it did not examine the qualitative attributes of its integration proposal. Nor did the Board address exceptions concerning the applicants' comparative qualifications. In view of our determination that Victory's 100 percent integration proposal should be fully credited, all of these matters must be considered before we can make an affirmative public interest finding with respect to either Victory or Johnson.

21. Under the circumstances of this case, we find that we would best serve the public interest by remanding this proceeding to the Review Board so that it may consider these matters in the first instance. The Commission has delegated authority to the Review Board to review exceptions to Initial Decisions. This enables the Commission to devote more time to major matters of policy and planning and to more significant adjudicatory matters. See *Horne Industries, Inc.*, FCC 83-205, 53 RR 2d 1647, 1648 ¶ 3 (1983); *Alexander S. Klein, Jr.*, 67 FCC 2d 894, 895 ¶ 2 (1977). This is an ordinary comparative case, and the Board, having reviewed the Initial Decision, is already familiar with the record. Accordingly, we remand this proceeding to the Review Board with instructions to consider expeditiously these matters and prepare a supplemental decision. If the matter is reappealed to the Commission, we will likewise attempt to complete our review expeditiously.

22. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the application for review, filed April 24, 1987 by Louise Brunson, IS DENIED; that the application for review, filed April 24, 1987 by Victory Media, Inc., IS GRANTED in part and DENIED in part; that the Decision of the Review Board, 2 FCC Rcd 1759 (1987), IS MODIFIED as reflected herein; and that the application filed by Louise Brunson (No. BPCT-840711KO) IS DENIED.

23. IT IS FURTHER ORDERED, That the proceeding in MM Docket Nos. 84-1032 and 84-1034 IS REMANDED to the Review Board for preparation of a Decision, and that the contingent application for review, filed April 24, 1987 by Johnson Broadcasting Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

**FOOTNOTES**

[1] Recent studies in corporate finance suggest that a capital structure consisting of voting and non-voting classes of stock will minimize a firm's cost of capital in some types of businesses. For the most part, these studies examine whether shareholders benefit from transactions which "replace a single class of voting stock with two classes, one of which -- given to management or an existing shareholder group -- has voting power substantially disproportionate to its interest in equity." Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 Va. L. Rev. 807, 810 (1987). See also Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. Chi. L. Rev. 119 (1987); Partch, *The Creation of a Class of Limited Voting Common Stock and Shareholder Wealth*, 18 J. Fin. Econ. 313 (1987); DeAngelo & DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. Fin. Econ. 33 (1985); Lease, McConnell & Mikkelson, *The Value of Control in Publicly-Traded Corporations*, 11 J. Fin. Econ. 439 (1983). In examining this technical question of corporate finance, scholars discuss why it may be efficient for some firms to adopt dual classes of common stock rather than some other capital structure.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules Governing
the Amateur Radio Services.

NOTICE OF PROPOSED RULE MAKING

**Adopted: March 24, 1988; Released: April 13, 1988**

By the Commission:

## I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*) we propose to reorganize Part 97 of the Code of Federal Regulations, 47 C.F.R. Part 97. This rule part governs the amateur radio services.[1] This revision is being proposed because advances in technology and changes in operating practices have made the current rules -- which are based on concepts associated with telegraphy and telephony -- difficult to apply to modern amateur communication practices. This *Notice* proposes rules to create a regulatory environment that will encourage modern techniques, technology and uses of amateur radio.

2. We also desire to eliminate unnecessary rules. Many rules in Part 97 are redundant; others are obsolete. Still others duplicate extensive details that are contained in other FCC rule parts and in the *International Telecommunication Union (ITU) Radio Regulations*. The deletion of these unnecessary rules together with a reorganization of the remaining rules will reduce the total body of amateur service rules by roughly 40 percent. This proceeding also provides an excellent opportunity to clarify certain rules and to codify certain existing policies that have grown in importance as modern amateur communication practices have evolved. It is also a timely opportunity to clarify the terminology used in the rules.

3. We wish to recognize and encourage the experimental nature of the amateur service. It is appropriate to avoid, to the extent possible, placing in the rules detailed regulations and specifications for the configuration and operation of various amateur communications systems. Such regulations and specifications would reduce the flexibility that is a hallmark of a service free to branch out and follow an infinite number of paths. A basic amateur service license document encompasses both an operator license and a station license. Our regulatory approach is to state the basic requirements that each amateur operator and station must observe. This enables amateur operators to utilize their individual stations in creating and pioneering communication systems that are limited only by their personal interests, imagination and technical skills.

## II. BACKGROUND

4. Part 97 last underwent a major restructuring in 1951[2], at a time when most communication systems in the amateur service utilized high frequency, hand keyed telegraphy and amplitude modulated telephony. Over the years a host of new technologies emerged and became popular in the amateur service: single-sideband and frequency modulated telephony, very-high and ultra-high frequency repeaters, radioteleprinting, satellite transponders, digital communications, television, etc. Rule additions and revisions to accommodate these technologies have been adopted as needed. The result is a patchwork of rules that can be confusing, particularly to prospective licensees. [3]

5. The desire and ability in the amateur community to assimilate and apply new technology has led to the development of new uses of amateur stations in communication systems.[4] The result has been to alter dramatically the landscape of amateur radio regulation. Amateur operators continue to find new ways to utilize their stations in communication systems, particularly for serving the public during communication emergency situations. Moreover, enabling legislation[5] has made it possible for the FCC to accept the voluntary services of amateur operators in performing functions formerly done by FCC staff. Amateurs serving as volunteer examiners (VEs) prepare, administer and coordinate operator license examinations. Amateur operators also assist our Field Operations Bureau with monitoring functions. These trends will continue. Therefore, it is necessary and timely to reorganize and clarify the rules in recognition of these advancements and to lay the framework upon which future advancements can be incorporated.

## III. PROPOSAL

6. Our starting point for reorganization of the rules is the definition of the amateur service. It is recognized internationally and domestically as:

> A radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs, that is, by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[6]

This statement of the basis for the amateur service is fundamental to the regulations we and telecommunication regulatory agencies in other countries are to provide.[7]

7. In the United States Part 97 embodies the rules for the amateur services. It begins with a recitation of fundamental purpose, expressed in five principles in Section 97.1, 47 C.F.R. § 97.1. These principles were adopted by the Commission in Docket 9295 (see paragraph 4 above) as a prospectus of the accomplishments expected to result from the activities of a healthy radio service functioning within the rules shaped toward this end. Section 97.1 stands as a general statement of objectives for the amateur service in the United States, and is continued and emphasized in the proposed rules.

8. We propose to restructure Part 97 into six subparts and four appendices as shown in the Appendix. Subpart A, *General Provisions*, contains those rules concerned principally with license and station location requirements. Subpart B, *Fundamental Purposes of the Amateur Service*,

organizes appropriate rules into groupings relating to the five principles of purpose expressed in Section 97.1: *serving the public, advancing the radio art, advancing skills, training operators and enhancing international goodwill.* Subpart C, *Station Operation Standards*, is comprised of those standards that generally apply to all types of amateur station operation. Subpart D, *Special Operations*, contains the requirements that apply only to non-standard operations such as beacons and repeaters, the amateur-satellite service and the RACES. The remaining technical standards are organized in Subpart E, *Technical Standards*. The requirements for the preparation and administration of operator examinations are in Subpart F, *Qualifying Examination Systems*. Appendix 1 lists the geographic areas where the amateur service is regulated by the Commission. Appendix 2 lists volunteer-examiner coordinator (VEC) regions. Appendix 3 is a glossary of terms used in the proposed rules. Appendix 4 is summary of the frequency sharing requirements for the amateur radio services stated in Sections 2.105 and 2.106, 47 C.F.R. §§ 2.105 and 2.106.

9. In addition to the glossary of terms in Appendix 3, we define terms where they first appear in the rules. Each term requiring definition is italicized when first used, followed by the parenthetical definition. For consistency in references to frequencies, the following terminology is used: frequency range (VHF, UHF, etc.), wavelength band (10 m, 70 cm, etc.), frequency segment (50.1-51.0 MHz, etc.), channel and frequency. Standard symbols for technical units are used throughout (dB, W, etc.).

10. We believe this format will make the rules easier to use and understand. We shall discuss each new subpart in detail.

A. *New Subparts*

11. *Subpart A -- General Provisions*. In this subpart, we assembled those rules that are basically concerned with license requirements and limitations on station location. The statement of the five principles of purpose remain as Section 97.1. We brought together into proposed Section 97.3 the definition of the three radio services governed by Part 97. The rules that establish the various types of operator and station authorizations, together with the application and procedural requirements, are contained in this subpart. Limitations on the location of an amateur station and on the height of an antenna and its associated support structure are also incorporated. Additionally, Section 97.9 defines the various classes of amateur operator licenses.

12. Section 97.11 includes rules for stations aboard ships or aircraft. We propose to delete current Section 97.101(c), 47 C.F.R. § 97.101(c), requiring that the electrical installation of an amateur station aboard ship or aircraft be in accord with other government rules. This is redundant. However, to promote safe aircraft operations during adverse weather conditions, we would add language providing that amateur equipment shall not be operated while any aircraft is operating under Instrument Flight Rules unless the equipment has been found to comply with all Federal Aviation Administration rules. Also, we propose to clarify that use of a common antenna in voluntary ship radio installations does not violate the rule requiring that an amateur station must be separate from and independent of all other radio apparatus installed on the same ship.

13. In Section 97.13(b) we state clearly that amateur stations in close proximity to Commission field monitoring facilities must protect these facilities from harmful interference. The Engineer-in-Charge of the local field office may impose operating restrictions on any amateur station failing to protect Commission monitoring facilities from harmful interference.

14. In Section 97.25 we update the procedural rules relating to Commission modification of an amateur station license. These rules are governed by Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316. This Section of the Act was amended by Public Law No. 98-214, 97 Stat. 1467 (1983). Proposed Section 97.25 conforms to the provisions of 47 U.S.C. § 316.

15. Current Section 97.95, 47 C.F.R. § 97.95, specifies rules for amateur station operation away from the licensed fixed station location. The original concept of a fixed station location revolved around an amateur operator's "ham shack" -- a room or small building where the station's transmitting and receiving devices were located. More often than not, these devices were built by the amateur operator, and, because of the state of technology at that time, incorporated delicate and bulky components including vacuum tubes, transformers and capacitors that made the devices not very portable. Today's amateur stations often employ commercially manufactured equipment. In the age of the microprocessor and the integrated circuit this equipment is highly portable. It is common for amateur operators to carry hand-held transceivers capable of accessing many local repeaters in urban areas and also capable of reasonably good line-of-sight communication. It appears that the concept of fixed station operation no longer carries with it the same connotation it did previously. For this reason, we propose to delete current rules that relate to station operation away from the authorized fixed station location.

16. *Subpart B -- Fundamental Purposes of the Amateur Service*. In this subpart, we use each one of the five principles of purpose discussed in paragraph 7 above, as a subheading for the rules related to that principle.

17. *Serving the Public*. Under the first heading, *serving the public*, the existing provisions in the rules and the special provisions in the ITU *Radio Regulations* pertaining to providing communications during emergencies are stated. These specifically include assisting in meeting essential communication needs when normal communications systems are overloaded, damaged or disrupted because of a natural disaster.[8] We have included the general international provision for assisting stations in distress.[9] We have also included our existing policy that it is permissible for an amateur station to provide communications for public gatherings if the public is the main beneficiary. The proposed rules provide additional clarity in defining permitted operations consistent with providing operating flexibility.

18. *Advancing the Radio Art*. Under the second heading in Subpart B, *advancing the radio art*, are the emission types authorized for the various frequency bands and segments. It is our intent that amateur operators in the United States be allowed to experiment with the full range of modulation types. However, in order to comply with international regulations, we are obligated to limit the interference potential of amateur stations, especially those transmitting in frequency bands shared with other services.

19. The principal use of emission designators in regulations for the amateur service is to relegate the transmission of certain inharmonious emission types to different segments of the frequency bands. Originally, emission designators were generally used to reserve a segment of a frequency band for telegraphy transmissions. Although the remainder of each frequency band could be used for either telegraphy or telephony transmissions, as a practical matter it was regarded as the telephony subband. As the amateur service has developed, other specific emission types have been authorized in somewhat piecemeal fashion.

20. Authorized emissions became even more confusing when the Commission's Rules were revised to incorporate the system of designators adopted in the Final Acts of the 1979 WARC.[10] Almost 1300 designators replaced the previous system of 14 designators used in Part 97. The greater specificity had the unintended effect of restricting previously permitted operations. We propose to remedy this with a much simpler system using terminology that is already familiar to most amateur operators.[11] This approach should eliminate the inadvertently imposed restrictions while continuing necessary emission type segregation. Additionally, the designators would be unambiguous and easy to understand, even for prospective Novice operators. The multitude of designators are categorized under the following nine terms and cross referenced to Part 2 of the Rules[12]:

1. *CW* – Single-channel amplitude-shift-keyed telegraphy emissions in international Morse code for aural or automatic reception.

2. *MCW* – Single-channel modulated tone telegraphy emissions in international Morse code for aural or automatic reception.

3. *Phone* – Telephony emissions.

4. *Image* – Single-channel emissions for facsimile and television.

5. *RTTY* – Single-channel emissions for narrowband direct-printing.

6. *Data* – Data emissions, including packet radio.

7. *Pulse* – Pulse emissions.

8. *SS* – Spread-spectrum emissions.

9. *Test* – Emissions containing no modulation or no information for on-the-air transmitter adjustment, two-tone amplifier linearity testing, antenna measurements, direction finding, ranging, etc.

21. Certain rule provisions for digital and spread-spectrum transmissions currently include exceptions to permit international use if special arrangements are made between the United States and the administration of any other country concerned. We propose to delete these exceptions. No such arrangements currently exist. Should the United States ever make such arrangements, we will provide public notice as we currently do for international third-party traffic and reciprocal arrangements.

22. *Advancing Skills.* Today's society is increasingly electronics-oriented. Maintenance of a pool of persons knowledgeable in electronics and innovative communications technology is clearly in the public interest.[13] There is a critical shortage of personnel skilled in the electronic arts and sciences. Yet there is a close vocational and avocational relationship between electronic competency and the skills and techniques of amateur radio.[14] Amateur radio is the only national reserve of trained communicator/technicians.[15] For this reason, it is in the public interest, convenience and necessity to maintain and enlarge the pool of amateur operators. Our primary tool to achieve this end is in providing the motivation to upgrade class of license through increased privileges to each higher operator license class.

23. The incentive licensing structure was established to assure that amateur operators enhance their skills as they remain in the amateur service. *See Report and Order*, Docket 15928, 32 Fed. Reg. 12682 (1967). In the past ten years, we have seen the highest of the five amateur operator classes, Amateur Extra, more than double from 18,794 amateur operators as of January 31, 1978, to 43,902 amateur operators as of December 31, 1987. The proportion of licensed amateur operators that are Amateur Extra has almost doubled as well. As of January 31, 1978, 5.68% of all amateur operators were Amateur Extra. As of December 31, 1987, that figure had risen to 10.12%.

24. To help clarify the privileges associated with each operator class, we propose to restructure the frequency table without actually affecting amateur operator frequency privileges. We reorganized and relocated to Appendix 4 the summary of frequency sharing limitations that are specified in Sections 2.105 and 2.106, 47 C.F.R. §§ 2.105 and 2.106. We provide a cross-reference to these rule sections in proposed Section 97.203(a) to make amateur operators aware that additional considerations in the use of a particular frequency segment may apply. We expect that annotated versions of our rules offered by publishers will continue to bring relevant frequency sharing requirements to the attention of amateur operators.

25. *Training Operators.* The fourth heading in Subpart B, *training operators*, incorporates operator examination requirements. These are the rules that place all amateur operators on notice of what they need to know to advance in the amateur service. Each amateur operator license conveys broad privileges to the holder. These privileges are many and they are diverse. Amateur operators are allowed to communicate using telegraphy, voice, teleprinting, packet radio, facsimile, television and other modes. They are allowed to communicate with amateur operators in other countries and, in some cases, send messages for third parties. An amateur operator is allowed to build, repair and modify amateur station transmitters. For such a flexible radio service to be practical, all amateur operators must thoroughly understand their responsibilities and have the skills necessary to operate an amateur station properly. Preparation for the various operator examinations helps operators to learn and hone the required skills. This subpart clearly defines the requirements for examinations at each skill level.

26. *International Goodwill.* The rules derived from the amateur service international communications requirements now in Appendix 2 are under the fifth heading, *enhancing international goodwill.* Transmissions between amateur stations of different countries are limited by international law to messages of a technical nature relating to tests and to remarks of a personal character that are so unimportant as not to justify recourse to the public telecommunications service.[16] We noted under this heading that we issue public notice of international arrangements for the amateur service upon notification from the U.S. State Department that an exchange of notes has occurred.

27. The amateur service is the only service outside of the common carrier services where two-way communications between private individuals in different countries are permitted. Practically every country allows some form of amateur radio communication. As a result, the amateur service is a potentially strong and credible projector of a nation's image abroad. A large segment of the world's radio amateur population regularly engages in distant contacts. In these contacts, amateur operators of different nations engage in personal dialogue. The amateur operator is usually representative of his/her country at the "grass roots" level. The amateur operator talks about subjects that are of day-to-day interest to other amateur operators contacted in other countries. This one-on-one dialogue that is made possible by worldwide amateur radio is an important cultural exchange.[17] International amateur communications are a basis for opinions formed of the United States worldwide. That is why one of the fundamental purposes of the amateur service in the United States is to foster international goodwill. The importance of this aspect of the amateur service is highlighted in this subpart.

28. *Alien reciprocal operating privileges*. Over the past decade we have issued approximately 130 alien reciprocal operating permits in the amateur service each month. At any given time about 1,500 of these authorizations are outstanding. Currently Subpart G of Part 97 contains the regulations for operating in accord with these permits. We propose to eliminate Subpart G in favor of conveying necessary information concerning alien operator privileges in the new Subpart B and information on obtaining an alien permit in the new Subpart A. Much of the latter information is also contained in FCC application form 610-A, *Application of Alien Amateur Radio Licensee For Permit To Operate in the United States*.

29. *Subpart C – Station Operation Standards*. In this subpart we centralize all amateur station operation standards. This subpart includes much of current Subparts D and E. We divide the amateur station operation standards into two sets. The basic standards are those common to all amateur station operations. The special operations are rules for specific types of amateur station operation.

30. *Frequency sharing*. We do not assign stations or designate transmitting frequency channels in the amateur service. Rather, we rely upon the control operator to select the station's transmitting channel from those frequencies available prior to causing or allowing the station to transmit. The frequency agility of amateur stations makes it possible for all amateur operators to cooperate in sharing all authorized amateur service frequency bands. Good amateur practice requires that the control operator monitor prospective transmitting channels and then select a channel where the station's transmissions will not cause harmful interference and will minimize incidental interference to other on-going communications. We propose to codify this concept under Subpart C with a new Section 97.203 called "frequency sharing." Certain duties are inherent in any shared frequency environment – namely, cooperation in channel selection and use to prevent harmful interference and to make the most effective use of the equencies. We propose to state these duties explicitly in ıe rules.

31. With the exception of frequency subbands that are .urrently designated in Part 97 to protect telegraphy and certain other forms of non-voice communication, the Commission and amateur operators rely upon informal arrangements within the amateur community, called voluntary band plans, to assist in achieving the goal of preventing harmful interference. It has been our experience that, consistent with good amateur practice, amateur operators adhere to these voluntary band plans with excellent results for the service. As a general proposition, we favor voluntary band plans over Commission-imposed subbands in the amateur service. Rule-mandated band plans may result in station operation inflexibility and increased enforcement and regulatory burdens.

32. *Station licensee responsibilities*. In proposed Section 97.205, the responsibilities of an amateur station licensee are stated. Section 97.205(c) clarifies Commission authority to inspect amateur stations. This authority is currently spread among three separate rules addressing authorized apparatus and amateur station and operator licenses. *See* 47 C.F.R. §§ 97.81(b), 97.82 and 97.83. The new rule would unify Commission inspection authority contained in these rules and clarify current Commission policy that the amateur station, including station records

33. Control *operator duties*. In proposed Section 97.207, the duties of a licensed station control operator are stated. By making decisions about equipment suitability, frequency selection, emission modes, message content, etc., the control operator is the key to proper operation of an amateur station. Without the control operator, unidentified and unauthorized uses of the frequencies are possible. Should this occur, the legitimacy of the service is imperiled.[18] Section 97.209 defines control point. Section 97.211 addresses specific forms of station control. In Section 97.211(c) we propose to clarify our authority to require any station under automatic control to discontinue operation upon notification from the Engineer-in-Charge of a Commission field office that the station is transmitting improperly or causing harmful interference to other stations.

34. *Points of communication and permissible one - way communications*. We are expanding and clarifying the rules relating to points of communication and permissible one-way communications. This includes the blanket waiver for the retransmission of space shuttle communications authorized by the Chief, Private Radio Bureau, on September 6, 1983.[19] In proposed Section 97.217, we simplify the rules concerning station identification procedures. In Section 97.217(b)(4) we make provisions for amateur stations transmitting television to perform the station identification procedure using our color broadcast standards as well as monochrome. We also add Section 97.217(g) to provide for a self-assigned identifier to be appended to a station call sign in the identification procedure. Such an identifier can be useful to the station as an efficient means of announcing the fact that the station is participating in a contest or a special event. Additionally, we specifically incorporate in the rules the basic premise that the amateur service has its own objectives and is not intended to be used as an alternative to other radio services or communications facilities.[20]

35. *Swap nets*. Business communications are prohibited in the amateur service. *See* 47 C.F.R. § 97.110. We relocated this prohibition in proposed Section 97.219(c). We added the exception that communications to inform other amateur operators of the availability of, or the need for, amateur station apparatus are not considered to be business communications. This type of communication is usually found in the context of "swap nets." A swap net is a

series of communications between two or more amateur stations conducted for the purpose of buying and selling amateur radio equipment.

36. Current policy permits amateur stations to transmit information about the availability of amateur radio equipment, notwithstanding Section 97.110, 47 C.F.R. § 97.110, prohibiting business communications. In this context, amateur radio equipment is equipment normally used in an amateur station by an amateur operator. An asking price may be mentioned, but no subsequent negotiations or bartering may take place. If interest is expressed, the amateur operators should exchange mailing addresses or telephone numbers and finish negotiations using means of communication other than amateur service frequencies. Dealers may not take advantage of this exception. Amateur operators who derive a profit by buying and selling amateur radio equipment on a regular basis are considered dealers and violate the business prohibition if they use amateur service frequencies for this purpose. Proposed Section 97.219(c) codifies these policies.

37. *Broadcast-related activities.* Questions frequently arise concerning the amateur service and broadcast-related activities. Broadcasting and broadcast-related activities are prohibited in the amateur service. *See* 47 C.F.R. § 97.113. An amateur station may not be used for any activity directly related to program production or newsgathering for broadcast purposes. However, in 1985 and 1986 we indicated in the texts of orders relating to amateur and broadcast services that we would permit amateur stations to convey news information in certain limited and unique circumstances. Those circumstances are if: (1) the event is unforeseen; (2) the news information is directly related to the event; (3) the event involves the safety of human life or the immediate protection of property; and (4) the news information cannot be transmitted by any means other than amateur radio because of the remote location of the originating transmission or because normal communications have been disrupted.[21] We propose to incorporate this policy in Section 97.219(f).

38. *Quiet hours.* We propose to remove certain specific time periods for the imposition of restrictions against amateur station transmissions in Sections 97.131(a), 97.133 and 97.135, 47 C.F.R. §§ 97.131(a), 97.133 and 97.135. Their purpose is to protect the domestic broadcast service from harmful interference. We believe that the necessary authority is contained in current Section 97.131(b), 47 C.F.R. § 97.131(b). We have recodified this rule as proposed Section 97.221, which states that the Commission may restrict operations of amateur stations as necessary to prevent harmful interference.

39. *Damage to equipment.* We propose to remove current Section 97.127, 47 C.F.R. § 97.127, prohibiting a licensed amateur operator from damaging any radio apparatus or installation in any licensed station. This rule inherently involves an overlap of federal and local jurisdiction. The underlying facts of such a violation would also necessarily constitute vandalism. We often receive complaints from people whose equipment was damaged seeking help based upon this rule. Complaints in the first instance in such a circumstance should be directed to local law enforcement authorities, who are in a position to provide some immediate assistance. Removal of this rule would not in any way diminish our authority to suspend an amateur operator license for such conduct. *See* 47 U.S.C. § 303(m)(1)(C).

40. *Notices of violation.* Finally, we remove rules that specify what an amateur station licensee must do upon receipt of a notice of violation. Such rules are unnecessary. The correspondence itself specifies what is required, and clearly states any penalties that may result from failure to respond or comply.

41. *Subpart D -- Special Operations.* In this subpart we assemble present and proposed provisions for those particular types of amateur operations that require special explanations or limitations. We propose to include auxiliary, beacon and repeater operations, remote control of amateur stations and model craft, and amateur-satellite and RACES operations in this subpart.

42. *Auxiliary operation.* We propose to delete the provisions of current Section 97.86(b), 47 C.F.R. § 97.86(b). This rule was intended to facilitate so-called "split-site-repeaters," where an auxiliary link is used to relay signals received at a distant receiving site to the station in repeater operation. It appears this provision is unnecessary. No amateur service rule prohibits such a practice.

43. *Beacon operation.* We conformed the minimum interval for an amateur station in beacon operation to perform the station identification procedure to the interval for all other forms of amateur station operation -- once every 10 minutes.

44. *Remote control.* In some cases, particularly in instances where an amateur station is situated on a hilltop or atop a tall building, it is neither desirable nor practical to have the control operator physically present at the transmitter site. The control operator may perform the necessary duties from a remote control point through a control link. This control link can be a dedicated wire line or public telephone interconnection from the control point to the remotely controlled station. Alternatively, an amateur station in auxiliary operation at the control point can be used to transmit control commands to the remotely controlled station. *See* 47 C.F.R. § 97.88 (radio remote control of an amateur station). We redrafted this rule as proposed Section 97.307.

45. The control operator must be able to control the station from the remote control point just as effectively as at a control point physically at the station site. Should the control link fail, the remotely controlled station's transmissions must cease after no more than three minutes. Many remotely controlled amateur stations operators include a three-minute time out timer in the control circuitry in order to meet this requirement. We believe, however, that the requirement to cease transmissions in three minutes may be unduly restrictive, particularly with respect to repeaters that are otherwise functioning properly. Therefore, we request comments on whether this time limit can be further relaxed, and, if so, what time limit would be appropriate. Further, we have removed the provisions of Section 97.88(c), 47 C.F.R. § 97.88(c), that require the control operator of a remotely controlled amateur station to monitor continuously the station's transmitting and receiving frequencies. These provisions would no longer be necessary because of the consolidation of control operator duties in proposed Section 97.207 and explicit frequency sharing requirements in proposed Section 97.203.

46. *Amateur - Satellite Service.* This subpart also includes the rules that apply to the amateur-satellite service. This service epitomizes the experimental nature of the amateur radio services and the dedication and ability of

amateur operators to contribute to the advancement of the radio art. It has enabled amateur operators to participate directly in space programs and has generated tremendous interest in space communications by amateur operators. OSCAR 1, the first amateur radio satellite, was launched into orbit in December, 1961. Since that time, with a series of OSCAR satellites, amateur operators have continued their efforts to experiment to achieve reliable, predictable long-distance and long-duration radio communications on HF and shorter wavelength bands. The amateur-satellite service was incorporated into the amateur service rules following its recognition in the Final Acts of the 1971 Space WARC (World Administrative Radio Conference). Today, amateur OSCAR satellites are used for real-time and delayed transmissions from anywhere beyond the major portion of the earth's atmosphere. We have replaced current detailed notification of intended space operation in the amateur-satellite service by reference to the requirements in the ITU *Radio Regulations*.

47. *Subpart E -- Technical Standards*. This subpart is comprised of the technical standards that must be met by amateur stations. We assembled the limitations on spurious emissions under proposed Section 97.401 and the limitations on maximum transmitting power under proposed Section 97.403. The provisions for digital and spread spectrum communications and external radio frequency power amplifiers are also consolidated in this subpart. We eliminated the redundant requirement that stations transmitting spread spectrum take steps to protect amateur stations in repeater operation. Repeater operation is adequately protected by the control operator and frequency sharing requirements.

48. As discussed in paragraph 30 above, we do not assign specific frequency channels to amateur stations. Nor do we divide the amateur service frequency bands into specific channels of a particular bandwidth. Therefore, considering the multitude of different emission types that could be transmitted, there is no need to specify precisely the maximum bandwidth that a transmitted signal may occupy. Our primary spectrum conservation approach is to encourage the good amateur practice of each amateur station transmitting in a manner that ensures that its signals are not unnecessarily broad. To this end, proposed Section 97.401 generally requires an amateur station transmission to occupy no more channel bandwidth than necessary for the information rate and emission type being transmitted.

49. While proposed Section 97.405 for digital communications is under this subpart, as a practical matter most of the relevant information about availability of particular channels for certain types of digital communications would be contained in proposed Section 97.131 (authorized emission types). We currently authorize certain standard digital communications, such as baudot, ASCII and AMTOR, that use personal computers or teleprinting machines with alphanumeric keyboards.[22]

50. We also permit the transmission of experimental digital codes on the 6 meter and shorter wave length bands in the amateur services. Amateur operators have taken advantage of this provision to be innovative in the area of digital transmissions. Packet radio is a currently burgeoning digital communications field. Packets are individual short bursts of digitally encoded data that take only milliseconds to send. Packet radio employs the time sharing capabilities of digital technology to conserve spectrum. The proposed rules provide flexibility to encourage continued development of efficient digital codes.

51. *Subpart F -- Qualifying Examination Systems*. This subpart centralizes the rules concerning the preparation, administration and coordination of amateur operator examinations. The Commission prepared, administered and coordinated examinations for Technician, General, Advanced and Amateur Extra Class operator licenses until the VEC system became fully operational in 1984. On December 1, 1983, final rules went into effect pursuant to Public Law 97-259, 96 Stat. 1087 (1982), that authorized the Commission to accept and employ the voluntary and uncompensated services of amateur operators in the preparation and administration of amateur operator examinations. *See Report and Order*, PR Docket No. 83-27, 48 Fed. Reg. 45653 (1983). Subsequently, the Communications Act was further amended to allow limited reimbursement of out-of-pocket costs incurred by VEs and VECs in connection with the preparation, processing or administration of examinations for amateur operator licenses. *See* Public Law 98-214, 97 Stat. 1467 (1983). We then adopted rules to implement this legislation. *See Report and Order*, PR Docket No. 84-265, 49 Fed. Reg. 30472 (1984).

52. Two volunteer examiner systems -- one for the Novice Class operator license and one for all other operator class licenses -- are now in place. All rules relating to the way in which VEs must conduct the preparation and administration of amateur operator examinations are under the heading of operator license examinations. All rules relating to the way in which volunteer-examiner coordinators (VECs) must coordinate amateur operator examinations are under the heading of volunteer-examiner coordinators. A final separate heading covers examination expense reimbursement. Additionally, we deleted the references to disposition and retention of examination papers in Sections 97.26(f), 97.27(d) and 97.28(h), 47 C.F.R. §§ 97.26(f), 97.27(d) and 97.28(h). The rules should not hamper the increasing use of personal computers in administering paperless examinations.

53. *Appendices*. We removed the current appendices to Part 97. Classification of emissions, now in Appendix 3, would be replaced by the system proposed in Subpart B. The other appendices are extracts or excerpts from international treaties and conventions. To the extent required, they are directly incorporated into the proposed rules. Four new appendices would be added. New Appendix 1 lists the geographic areas where the amateur service is regulated by the Commission. New Appendix 2 specifies the VEC regions currently listed in Section 97.507(b), 47 C.F.R. § 97.507(b). New Appendix 3 is a glossary index, listing the locations throughout the rules where terms are defined. New Appendix 4 is a summary of the sharing requirements currently listed in Section 97.7(g), 47 C.F.R. § 97.7(g).

## IV. CONCLUSION

54. This reorganization of the rules achieves the objectives we delineated at paragraphs 2 through 8 above. We seek comments on the proposed rules, and we urge interested parties to recommend additional consolidations, clarifications and reductions in regulatory burdens. We also seek the comments of publishers and distributors of commercial versions of Part 97. Accordingly, we propose to revise Part 97 to modify, clarify and update the amateur

radio services rules, as set forth in Appendix A. Cross reference lists for the current and proposed rules are set forth in Appendices B and C.

55. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

56. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

57. Authority for issuance of this *Notice* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 31, 1988** and reply comments on or before **October 31, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, DC 20554.

58. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities, because these entities may not use the amateur radio services for commercial radiocommunication. *See* 47 C.F.R. § 97.3(b). Moreover, the proposed rules would not require the use of or significantly enhance the sale of any additional amateur radio services apparatus.

59. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

60. IT IS ORDERED, That the Secretary shall cause a copy of this *Notice* to be served upon the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

## APPENDIX A

Part 97 of Chapter 1 of Title 47 of the *Code of Federal Regulations* is amended, as follows:

1. The authority citation for Part 97 would continue to read as follows:

**Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.**

2. Part 97 would be revised as follows:

## PART 97 -- AMATEUR RADIO SERVICE

### Subpart A - General Provisions

Sec.
97.1 Basis and purpose.
97.3 The amateur radio services.
97.5 Station license required.
97.7 Control operator required.
97.9 Operator license.
97.11 Stations aboard ships or aircraft.
97.13 Restrictions on the station location.
97.15 Antenna structure hazard to aircraft.
97.17 Application for license.
97.19 Renewed or modified license.
97.21 Mailing address and station location.
97.23 License term.
97.25 FCC modification of station license.
97.27 Replacement license.

**Subpart B - Fundamental Purposes of the Amateur Service**

**Serving the public**

97.101 Operation during a disaster.
97.103 Safety of life and protection of property.
97.105 Station in distress.
97.107 Communications for public gatherings.

**Advancing the radio art**

97.131 Authorized emission types.

**Advancing skills**

97.151 Control operator frequency privileges.
97.153 Alien control operator privileges.

**Training operators**

97.171 Qualifying for an amateur operator license.
97.173 Examination elements and standards.
97.175 Examination requirements.

**Enhancing international goodwill**

97.191 International communications.

**Subpart C - Station Operation Standards**

97.201 Good amateur practice.
97.203 Frequency sharing.
97.205 Station licensee responsibilities.
97.207 Control operator duties.
97.209 Control point.
97.211 Station control.
97.213 Authorized transmissions.
97.215 Third-party traffic.
97.217 Station identification procedure.
97.219 Prohibited transmissions.
97.221 Restricted operation.

**Subpart D - Special Operations**

97.301 Auxiliary operation.
97.303 Beacon operation.
97.305 Repeater operation.
97.307 Remote control of an amateur station.
97.309 Remote control of model craft.
97.311 Space operation.
97.313 Earth operation.
97.315 Telecommand operation.
97.317 RACES operation.

**Subpart E - Technical Standards**

97.401 Purity of transmissions.
97.403 Maximum transmitting power.
97.405 Digital communications.
97.407 Spread spectrum communications.
97.409 Type acceptance of external RF power amplifiers.
97.411 Standards for type acceptance of external RF power amplifiers.

**Subpart F - Qualifying Examination Systems**

**Operator License Examinations**

97.501 Examination administration procedures.
97.503 Examination preparation.
97.505 Examination element credit.
97.507 Technician, General, Advanced, and Amateur Extra operator examination administration.
97.509 Novice operator examination administration.
97.511 Volunteer examiner requirements.
97.513 Volunteer examiner conduct.

**Volunteer-examiner Coordinators**

97.521 Agreement required.
97.523 VEC qualifications.
97.525 Coordinating examinations.
97.527 VEC question pools.
97.529 Accrediting VEs.

**Examination Expense Reimbursement**

97.541 Reimbursement for expenses.

Appendix 1 Places Where Amateur Radio Services Are Regulated By The FCC.
Appendix 2 VEC Regions.
Appendix 3 Glossary of Terms.
Appendix 4 Frequency Sharing Requirements.

**Subpart A - General Provisions**

**§ 97.1 Basis and purpose.**

The rules and regulations in this part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:

(a) Recognition and enhancement of the value of the amateur service to the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications.

(b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art.

(c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art.

(d) Expansion of the existing reservoir within the amateur radio service of trained operators, technicians, and electronics experts.

(e) Continuation and extension of the amateur's unique ability to enhance international goodwill.

**§ 97.3 The amateur radio services.**

(a) The *amateur service* is a radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs, that is, duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.

(b) The *amateur-satellite service* is a radiocommunication service using stations on earth satellites for the same purpose as those of the amateur service.

(c) The *RACES* (radio amateur civil emergency service) provides for amateur station operation for civil defense communications during periods of local, regional or national civil emergencies.

**§ 97.5 Station license required.**

(a) When an apparatus is transmitting on any amateur service frequency from a geographic location within the major portion of the earth's atmosphere where the amateur service is regulated by the *FCC* (Federal Communications Commission) (see Appendix 1), the person having physical control of the apparatus must hold a written authorization for an *amateur station* (a station in the amateur service including necessary apparatus at a particular location used for transmitting).

(b) When an apparatus is transmitting on any amateur service frequency from any vessel or craft registered in the United States or owned or operated by a United States citizen or entity and the vessel or craft is within or beyond the major portion of the earth's atmosphere, the person having physical control of the apparatus must hold a written authorization for an amateur station.

(c) The types of written authorizations that permit amateur station operation where the amateur services are regulated by the FCC are:

(1) An amateur operator/primary amateur station license (on FCC Form 660) issued to the person by the FCC. A primary amateur station license is issued only to a person together with an amateur operator license on the same document. Every amateur operator licensed by the FCC must have one, but only one, primary amateur station license. Except for a representative of a foreign government, any person who qualifies by examination is eligible to apply for an amateur operator/primary station license.

(2) An amateur service club station license (on FCC Form 660) issued to the person by the FCC. A club station license is issued only to the person who is the license trustee designated by an officer of the club. The trustee must hold an FCC-issued Amateur Extra, Advanced, General, or Technician operator license. The trustee must not be a representative of a foreign government. The club must be composed of at least two persons and must have a name, a constitution, management and a primary purpose devoted to amateur service activities consistent with these rules. (Note: No new license for a club station will be issued; however, existing licenses may be renewed or modified upon proper application.)

(3) An amateur service military recreation station license (on FCC Form 660) issued to the person by the FCC. A military recreation station license is issued only to the person who is the license custodian designated by the official in charge of United States military recreational premises where the the station is situated. The custodian must not be a representative of a foreign government. The custodian does not have to hold an amateur operator license. (Note: No new license for a military recreation station will be issued; however, existing licenses may be renewed or modified upon proper application.

(4) A RACES station license (on FCC Form 660) issued to the person by the FCC. A RACES station license is issued only to the person who is the license custodian designated by the official responsible for the governmental agency served by that civil defense organization. The custodian must not be a representative of a foreign government. The custodian must be the civil defense official responsible for coordination of all civil defense activities in the area concerned. The custodian does not have to hold an amateur operator license. (Note: No new license for a RACES station will be issued; however, existing licenses may be renewed or modified upon application.

(5) A reciprocal permit for alien amateur licensee (on FCC Form 610-AL) issued to the person by the FCC. A reciprocal permit for alien amateur licensee is issued only to an alien who is a citizen of a country with which the United States has arrangements to grant reciprocal operating permits to visiting alien amateur operators. The alien must hold an amateur service license from the country of citizenship. The alien must not be a representative of a foreign government. No person who is a citizen of the United States, regardless of any other citizenship also held, is eligible for a reciprocal permit. No person holding an FCC-issued amateur service license is eligible to also hold a reciprocal permit for alien amateur license. (Note: Reciprocal permits are not renewable, however, new reciprocal permits will be issued upon proper application.)

(6) An amateur service license issued to the person by the Government of Canada. The person must be a citizen of Canada. The person must not be a representative of a foreign government.

(d) The written authorization for an amateur station authorizes the use in accordance with FCC rules of all transmitting apparatus under the physical control of the station licensee at points where the amateur radio services are regulated by the FCC. The original written authorization document or a photocopy thereof must be retained at the station.

**§ 97.7 Control operator required.**

When transmitting, each amateur station must have a control operator. The control operator must be an *amateur operator* (a person holding a written authorization to be the control operator of an amateur station). Only a person holding at least one of the following documents may be the control operator of an amateur station:

(a) An amateur operator/primary station license (on FCC Form 610) issued to the person by the FCC.

(b) A reciprocal permit for alien amateur licensee (on FCC Form 610-AL issued to the person by the FCC.

(c) An amateur service license issued to the person by the Government of Canada. The person must be a citizen of Canada.

**§ 97.9 Operator license.**

(a) There are 5 classes of operator licenses: Novice, Technician, General, Advanced and Amateur Extra. The degree of skill and knowledge an applicant demonstrates by examination determines the class of operator license for which the person is qualified.

(b) An amateur operator license authorizes the holder to be the control operator of an amateur station with the privileges of the operator class specified. The license document or a photocopy thereof must be in the personal possession of the licensee at all times when the person is the control operator of an amateur station.

(c) A Novice, Technician, General, or Advanced operator who has properly filed with the FCC an application for a higher operator class which has not yet been acted upon, and who holds a *CSCE* (certificate of successful

completion of an examination) indicating that the person completed the necessary examinations within the previous 365 days is authorized to exercise the rights and privileges of the higher operator class.

**§ 97.11 Stations aboard ships or aircraft.**

(a) The installation and operation of an amateur station on a ship or aircraft must be approved by the master of the ship or pilot in command of the aircraft.

(b) The station must be separate from and independent of all other radio apparatus installed on the same ship or aircraft, except antennas in the use of voluntary ship radio installations.

(c) Transmissions from the station must not cause interference to any other apparatus installed on the same ship or aircraft.

(d) The station must not constitute a hazard to the safety of life or property.

(e) The equipment shall not be operated while the aircraft is operating under Instrument Flight Rules, as defined by the Federal Aviation Administration (FAA) unless the amateur equipment has been found to comply with all applicable FAA rules.

**§ 97.13 Restrictions on the station location.**

(a) Before placing an amateur station on land of environmental or historical importance (such as a site significant in American history, architecture or culture), the licensee may be required to take certain actions prescribed by §§ 1.1305-1.1319 of the FCC Rules.

(b) An amateur station within 1600 *m* (meters) of an FCC monitoring facility must protect that facility from harmful interference. Failure to do so could result in imposition of operating restrictions upon the amateur station by the *EIC* (Engineer-in-Charge of an FCC field facility) pursuant to § 97.221 of the FCC Rules. Geographical coordinates of the facilities that require protection are listed in § 0.121(c) of the FCC Rules.

**§ 97.15 Antenna structure hazard to aircraft.**

An amateur station *antenna structure* (the radiating elements, tower, supports, and all appurtenances mounted thereon) no higher than 6.1 m (20 feet) above any other type of structure it is mounted upon, is exempt from the requirements of this Section.

(a) Before placing an antenna on an existing antenna structure more than 61 m (200 feet) above ground level at its site, the licensee must notify the FCC on FCC Form 854, and receive prior approval from the FCC.

(b) Before placing an antenna structure higher than the following limits, the licensee must notify both the *FAA* (Federal Aviation Administration) on FAA Form 7460-1 and the FCC on FCC Form 854, and receive prior approval from the FCC:

(1) An antenna structure more than 61 m (200 feet) above ground level at its site.

(2) An antenna structure at an airport or heliport that is available for public use and is listed in the *Airport Directory* of the current *Airman's Information Manual* or in either the *Alaska* or *Pacific Airman's Guide and Chart Supplement* ; or at an airport or heliport under construction that is the subject of a notice or proposal on file with the FAA, and except for military airports, it is clearly indicated that the airport will be available for public use; or at an airport or heliport that is operated by the armed forces of the United States; or at a place near any of these airports or heliports that is to be:

(i) More than 1 m higher than the airport elevation for each 100 m from the nearest runway longer than 1 km within 6.1 km of the antenna structure.

(ii) More than 2 m higher than the airport elevation for each 100 m from the nearest runway longer than 1 km within 3.1 km of the antenna structure.

(iii) More than 4 m higher than the airport elevation for each 100 m from the nearest landing pad within 1.5 km of the antenna structure.

(c) Further details as to whether an aeronautical study and/or obstruction marking and lighting may be required, and specifications for obstruction marking and lighting, are contained in Part 17 of the FCC rules, *Construction, Marking, and Lighting of Antenna Structures.*

**§ 97.17 Application for license.**

(a) Any qualified person, except a representative of a foreign government, is eligible to apply for an amateur service license or permit.

(b) Each application for an operator/primary station license must be made on FCC Form 610. Each application for a club, military recreation or RACES station license license must be made on FCC Form 610-B. Each application for a reciprocal permit for alien amateur licensee must be made on FCC Form 610-A.

(c) Each application for a new operator/primary station license and each application involving a change in operator class must be submitted by the applicant to the volunteer examiners *(VEs)* administering the qualifying examination.

(d) Each application for a reciprocal permit for alien amateur licensee must be submitted to the FCC, P.O. Box 1020, Gettysburg, PA 17326.

(e) No person shall obtain or attempt to obtain, or assist another person to obtain or attempt to obtain, an amateur operator license or reciprocal permit for alien amateur licensee by fraudulent means.

(f) A call sign will be assigned to each amateur station on a systematic basis. The FCC will issue public announcements detailing the policies and procedures of the call sign assignment system. The FCC will not grant any request for a specific call sign.

**§ 97.19 Renewed or modified license.**

(a) Each application for a renewed or modified amateur service license must be accompanied by a photocopy of the license document or the original document. Except for a modification involving a change in operator class, the application must be submitted to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

(b) When the licensee has submitted a sufficient application for renewal of an unexpired license (between 60 and 90 days prior to the end of the license term is recommended), the license will not expire until the disposition of the application has been determined. After an amateur service license expires, application for renewal may be made during a grace period of 2 years after the expiration date. During this grace period, the expired license is not valid. A license renewed during the grace period will be dated as of the date of the renewal.

**§ 97.21 Mailing address and station location.**

Each application for an amateur service license and each application for a reciprocal permit for alien amateur licensee must show a mailing address and a station location (the addresses may be the same) in an area where the amateur service is regulated by the FCC. The mailing address must be one where the licensee can receive from the FCC mail delivery by the United States Post Office. The station location must be a place where a station can be physically located. (A postal box, RFD number, or general delivery is unsuitable as a station location.)

**§ 97.23 License term.**

(a) Amateur operator/primary station licenses and club, military recreation and RACES station licenses are normally issued for a 10 year term.

(b) A reciprocal permit for alien amateur license is normally issued only for a 1 year term.

**§ 97.25 FCC modification of station license.**

(a) The FCC may modify an amateur station license, either for a limited time or for the duration of the term thereof, if it determines:

(1) that such action will promote the public interest, convenience and necessity; or

(2) that such action will cause the provisions of the Communications Act of 1934, as amended, or any treaty ratified by the United States, to be more fully complied with.

(b) When the FCC makes such a determination, it will issue an order of modification. The order of modification will not become final until the licensee is notified in writing of the proposed action and the grounds and reasons therefor. The licensee will be given reasonable opportunity of no less than thirty days to protest the modification; except that, where safety of life or property is involved, a shorter period of notice may be provided. Any protest by a licensee of an FCC order of modification will be handled in accord with the provisions of 47 U.S.C. § 316.

**§ 97.27 Replacement license.**

Each licensee or permittee whose original document is lost, mutilated or destroyed must request a replacement. The request must be made to: FCC, P.O. Box 1020, Gettysburg, PA 17326. A statement of how the document was lost, mutilated or destroyed must be attached to the request. A replacement license must bear the same expiration date as the license for which it is a replacement.

**Subpart B - Fundamental Purposes of the Amateur Service**

**Serving the Public**

**§ 97.101 Operation during a disaster.**

(a) When normal communication systems are overloaded, damaged or disrupted because a disaster has occurred, or is likely to occur, in an area where the amateur service is regulated by the FCC, an amateur station may make transmissions necessary to meet essential communication needs and facilitate relief actions.

(b) When normal communication systems are overloaded, damaged or disrupted because a natural disaster has occurred, or is likely to occur, in an area where the amateur service is not regulated by the FCC, an amateur station assisting in meeting essential communication needs and facilitating relief actions may do so only in accord with *ITU* (International Telecommunication Union) Resolution No. 640 (Geneva, 1979). The *HF* (high frequency) 80 m, 75 m, 40 m, 30 m, 20 m, 15 m and 12 m bands and the *VHF* (very-high frequency) 2 m band may be used for these purposes.

(c) When a disaster disrupts normal communication systems in a particular area, the FCC may declare a temporary state of communication emergency. The declaration will set forth any special conditions and special rules to be observed by amateur stations during the communication emergency. A request for a declaration of a temporary state of emergency should be directed to the EIC in the area concerned.

(d) An amateur station may transmit emissions J3E and R3E on the channel at 5.176 *MHz* (megahertz) within Alaska or within 80.5 km of Alaska for emergency communications with other stations authorized to use this frequency in Alaska. The frequency must be shared with stations licensed in the Alaska private fixed service which may also transmit non-emergency communications. The transmitter power must not exceed 150 *W* (watts).

**§ 97.103 Safety of life and protection of property.**

No provision of these rules prevents the use by an amateur station of any means of radiocommunication at its disposal to provide essential communication needs in connection with the immediate safety of human life and immediate protection of property when normal communication systems are not available.

**§ 97.105 Station in distress.**

(a) No provision of these rules prevents the use by an amateur station in distress of any means at its disposal to attract attention, make known its condition and location, and obtain assistance.

(b) No provision of these rules prevents the use by an amateur station, in the exceptional circumstances described in paragraph (a), of any means of radiocommunications at its disposal to assist a station in distress.

**§ 97.107 Communications for public gatherings.**

An amateur station may transmit communications in support of a public gathering (parade, race, marathon, etc.) only where the main beneficiary of such communications is the public. An amateur station may not be used for logistical support of any sponsoring organization.

**Advancing the radio art**

**§ 97.131 Authorized emission types.**

(a) The following terms are used in this part to indicate emission types. (Refer to § 2.201 of the FCC rules, *Emission, modulation and transmission characteristics*, for information on emission type designators.)

(1) *Test* (emissions containing no information or no modulation; test does not include pulse emissions with no information or no modulation unless pulse emissions are also authorized in the frequency band.)

(2) *Amplitude-modulated* and *angle-frequency / phase - modulated* emission types:

(i) *CW* (international Morse code telegraphy emissions having A, C, H, J or R as the first symbol; 1 as the second symbol; A or B as the third symbol; J2A and J2B.)

(ii) *MCW* (tone-modulated international Morse code telegraphy emissions having A, C, D, F, G, H or R as the first symbol; 2 as the second symbol; A or B as the third symbol.)

(iii) *Phone* (speech emissions having A, C, D, F, G, H, J or R as the first symbol; 1, 2 or 3 as the second symbol; E as the third symbol; and speech emissions having B as the first symbol; 7, 8 or 9 as the second symbol; E as the third symbol.) MCW for the purpose of performing the station identification procedure, and MCW for the purpose of providing telegraphy practice interspersed with speech, and incidental tones for the purpose of selective calling or alerting or to control the level of a demodulated signal may also be considered phone.

(iv) *Image* (facsimile and television emissions having A, C, D, F, G, H, J, or R as the first symbol; 1, 2 or 3 as the second symbol; C or F as the third symbol; and B as the first symbol; 7, 8 or 9 as the second symbol; W as the third symbol.)

(3) *RTTY* (narrow-band direct-printing emissions using International Telegraph Alphabet Number 2, American Standard Code for Information Interchange ANSI X3.4-1977], or International Radio Consultative Committee Recommendation CCIR 476-2 [1978], 476-3 [1982], 476-4 [1986] or 625 [1986], as appropriate, Mode A or B, having A, C, D, F, G, H, J or R as the first symbol; 1 as the second symbol; B as the third symbol; and emission J2B.) International Morse code telegraphy angle modulated emissions may also be considered RTTY.

(4) *Data* (telemetry, telecommand, and data [including packet radio] emissions having A, C, D, F, G, H, J or R as the first symbol; as the second symbol; D as the third symbol; and emission J2D.)

(5) *Pulse* (emissions having K, L, M, P, Q, V or W as the first symbol; 0, 1, 2, 3, 7, 8, 9 or X as the second symbol; N, A, B, C, D, E, F, W or X as the third symbol.)

(6) *SS* (spread-spectrum using bandwidth-expansion modulation emissions A, C, D, F, G, H, J or R as the first symbol; X as the second symbol; X as the third symbol.)

(b) An amateur station may transmit CW on any frequency otherwise authorized to the control operator.

(c) An amateur station may transmit a test emission on any frequency otherwise authorized to the control operator for brief periods for experimental purposes, except that no pulse modulation emission may be transmitted on any frequency where pulse is not specifically authorized.

(d) An amateur station may transmit the following emission types on frequencies otherwise authorized to the control operator on the amateur service frequencies indicated, subject to the standards specified in paragraph (e).

| Wavelength band | Frequencies | Emission types authorized | Standards (paragraph (e)) |
|---|---|---|---|
| MF (medium frequency) | | | |
| 160 m | entire band | phone, image, RTTY, data ... | (1), (2), (3) |
| HF | | | |
| 80 m | entire band | RTTY, data ..... | (3), (10) |
| 75 m | entire band | phone, image ..... | (1), (2) |
| 40 m | 7.000-7.075 MHz | RTTY, data ..... | (3) |
| -do- | 7.075-7.100 MHz | phone, image ..... | (1), (2), (12) |
| -do- | 7.10-7.15 MHz | RTTY, data ..... | (3) |
| -do- | 7.15-7.30 MHz | phone, image ..... | (1), (2) |
| 30 m | entire band | RTTY, data ..... | (3) |
| 20 m | 14.00-14.15 MHz | RTTY, data ..... | (3) |
| -do- | 14.15-14.35 MHz | phone, image ..... | (1), (2) |
| 15 m | 21.0-21.2 MHz | RTTY, data ..... | (3), (10) |
| -do- | 21.20-21.45 MHz | phone, image ..... | (1), (2) |
| 12 m | 24.89-24.93 MHz | RTTY, data ..... | (3) |
| -do- | 24.93-24.99 MHz | phone, image ..... | (1), (2) |
| 10 m | 28.0-28.3 MHz | RTTY, data ..... | (4), (10) |
| -do- | 28.3-29.5 MHz | phone, image ..... | (1), (2), (11) |
| -do- | 28.5-29.0 MHz | phone, image ..... | (1), (2) |
| -do- | 29.0-29.7 MHz | phone, image ..... | (2) |
| VHF | | | |
| 6 m | 50.1-51.0 Mhz | MCW, phone, image, RTTY, data ..... | (2), (5), (7), (14) |
| -do- | 51.0-54.0 MHz | MCW, phone, image, RTTY, data, test ..... | (2), (5), (7), (14) |
| 2 m | 144.1-148.0 MHz | MCW, phone, image, RTTY, data, test ..... | (2), (5), (7), (14) |
| 1.25 m | entire band | MCW, phone, image, RTTY, data, test ..... | (2), (5), (7), (14) |
| UHF (ultra-high frequency) | | | |
| 70 cm | entire band | MCW, phone, image, RTTY, data, SS, test ..... | (6), (8), (13), (14) |
| 33 cm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 23 cm | entire band | MCW, phone, image, RTTY, data, SS, test ..... | (6), (9), (13), (14) |
| 13 cm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| SHF (super-high frequency) | | | |
| 9 cm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 5 cm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 3 cm | entire band | MCW, phone, image, RTTY, data, SS, test ..... | (6), (9), (13), (14) |
| 1.2 cm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| EHF (extremely high frequency) | | | |
| 6 mm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 4 mm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 2.5 mm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 2 mm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |
| 1 mm | entire band | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), ~~(14)~~ |
| --- | above 300 GHz | MCW, phone, image, RTTY, data, SS, test, pulse ..... | (6), (9), (13), (14) |

(e) Emission standards (refer to paragraph (d)):

(1) No angle-modulated emission transmitted on this frequency band may have a modulation index greater than 1 at the highest modulation frequency.

(2) No non-phone emission transmitted on this frequency band may exceed the bandwidth of a communications quality phone emission of the same modulation type. An independent sideband emission (having B as the first symbol) or a multiplexed image and phone emission may be transmitted on this frequency band provided that the total bandwidth does not exceed that of a communications quality emission A3E transmission.

(3) For RTTY and data emissions transmitted on this frequency band, the sending speed must not exceed 300 baud, or the frequency shift between mark and space must not exceed 1 kHz.

(4) For RTTY and data emissions transmitted on this frequency band, the sending speed must not exceed 1200 baud, or the frequency shift between mark and space must not exceed 1 kHz.

(5) For RTTY and data emissions transmitted on this frequency band, the sending speed must not exceed 19.6 kilobaud, or the frequency shift between mark and space must not exceed 1 kHz.

(6) For RTTY and data emissions transmitted on this frequency band, the sending speed must not exceed 56 kilobaud, or the frequency shift between mark and space must not exceed 1 kHz.

(7) RTTY and digital emissions using any digital code may be transmitted on this frequency band only to points where the amateur service is regulated by the FCC. The *authorized bandwidth* (the width of the frequency band outside of which the mean power of the total emission must be attenuated at least 26 *dB* (decibels) below the mean power of the total emission) is 20 kHz.

(8) RTTY and digital emissions using any digital code may be transmitted on this frequency band only to points where the amateur service is regulated by the FCC. The authorized bandwidth is 100 kHz.

(9) RTTY and digital emissions using any digital code may be transmitted on this frequency band only to points where the amateur service is regulated by the FCC.

(10) A station having a Novice or Technician control operator may only transmit a CW emission on this frequency band.

(11) A station having a Novice or Technician control operator may only transmit CW emissions and phone single-sideband emissions J3E and R3E on this frequency band.

(12) Amplitude-modulated and angle-modulated emissions may be transmitted on this frequency band only by amateur stations located in ITU Regions 1 and 3, and by amateur stations located within ITU Region 2 that are west of $130^0$ West longitude or south of $20^0$ North latitude.

(13) Multiplexed signals on the same *RF* (radio frequency) carrier are permitted on this frequency band where the resulting emission bandwidth does not exceed that of the greatest authorized bandwidth for this frequency band.

(14) A RTTY emission having 2, 7 or 9 as the second symbol is also permitted within bandwidth limitations. A data emission having A, B, C, D, F, G, H, J or R as the first symbol; 1, 2, 7 or 9 as the second symbol; and D or W as the third symbol is also permitted.

**Advancing skills**

**§ 97.151 Control operator frequency privileges.**

The following transmitting frequency bands are available to amateur stations having a control operator of the license class designated and located within the major portion of the earth's atmosphere, including aeronautical, land and marine locations within the ITU Region designated, except where the amateur service is regulated by another country or United States agency:

(a) Technician, General, Advanced, and Amateur Extra operators:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| VHF | | | | |
| 6 m | --- | 50-54 MHz | 50-54 MHz | 1 |
| 2 m | 144-146 MHz | 144-148 MHz | 144-148 MHz | 1 |
| 1.25 m | --- | 220-225 MHz | --- | 1, 2, 6 |
| UHF | | | | |
| 70 cm | 430-440 MHz | 420-450 MHz | 430-440 MHz | 1, 2, 7 |
| 33 cm | --- | 902-928 MHz | --- | 1, 2, 8 |
| 23 cm | 1240-1300 MHz | 1240-1300 MHz | 1240-1300 MHz | 10 |
| 13 cm | 2300-2310 MHz | 2300-2310 MHz | 2300-2310 MHz | 1, 2, 11 |
| -do- | 2390-2450 MHz | 2390-2450 MHz | 2390-2450 MHz | 1, 2, 11 |
| SHF | | | | |
| 9 cm | --- | 3.3-3.5 GHz | 3.3-3.5 GHz | 1, 2, 12, 13 |
| 5 cm | 5.650-5.850 GHz | 5.650-5.925 GHz | 5.650-5.850 GHz | 1, 2, 14 |
| 3 cm | 10.00-10.50 GHz | 10.00-10.50 GHz | 10.00-10.50 GHz | 2, 3, 9, 15 |
| 1.2 cm | 24.00-24.25 GHz | 24.00-24.25 GHz | 24.00-24.25 GHz | 1, 2, 9, 15 |
| EHF | | | | |
| 6 mm | 47.0-47.2 GHz | 47.0-47.2 GHz | 47.0-47.2 GHz | |
| 4 mm | 75.5-81.0 GHz | 75.5-81.0 GHz | 75.5-81.0 GHz | 2, 3, 9 |
| 2.5 mm | 119.98-120.02 GHz | 119.98-120.02 GHz | 119.98-120.02 GHz | 12, 17 |
| 2 mm | 142-149 GHz | 142-149 GHz | 142-149 GHz | 2, 3, 9, 12 |
| 1 mm | 241-250 Ghz | 241-250 GHz | 241-250 GHz | 2, 3, 9, 18 |
| --- | above 300 GHz | above 300 GHz | above 300 GHz | 12 |

(b) Amateur Extra operator:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| MF | | | | |
| 160 m | 1810-1850 kHz | 1800-2000 kHz | 1800-2000 kHz | 1, 2, 3 |
| HF | | | | |
| 80 m | 3.50-3.75 MHz | 3.50-3.75 MHz | 3.50-3.75 MHz | 1 |
| 75 m | 3.75-3.80 MHz | 3.75-4.00 MHz | 3.75-3.90 MHz | 1 |
| 40 m | 7.0-7.1 MHz | 7.1-7.3 MHz | 7.0-7.1 MHz | 1 |
| 30 m | 10.10-10.15 MHz | 10.10-10.15 MHz | 10.10-10.15 MHz | 4 |
| 20 m | 14.00-14.35 MHz | 14.00-14.35 MHz | 14.00-14.35 MHz | |
| 15 m | 21.00-21.45 MHz | 21.00-21.45 MHz | 21.00-21.45 MHz | |
| 12 m | 24.89-24.99 MHz | 24.89-24.99 MHz | 24.89-24.99 MHz | 5 |
| 10 m | 28.0-29.7 MHz | 28.0-29.7 MHz | 28.0-29.7 MHz | |

(c) Advanced operator:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| MF | | | | |
| 160 m | 1810-1850 kHz | 1800-2000 kHz | 1800-2000 kHz | 1, 2, 3 |
| HF | | | | |
| 80 m | 3.525-3.750 MHz | 3.525-3.750 MHz | 3.525-3.750 MHz | 1 |
| 75 m | 3.775-3.800 MHz | 3.775-4.000 MHz | 3.775-3.900 MHz | 1 |
| 40 m | 7.025-7.100 MHz | 7.025-7.300 MHz | 7.025-7.100 MHz | 1 |
| 30 m | 10.10-10.15 MHz | 10.10-10.15 MHz | 10.10-10.15 MHz | 4 |
| 20 m | 14.025-14.150 MHz | 14.025-14.150 MHz | 14.025-14.150 MHz | |
| -do- | 14.175-14.350 MHz | 14.175-14.350 MHz | 14.175-14.350 MHz | |
| 15 m | 21.025-21.200 MHz | 21.025-21.200 MHz | 21.025-21.200 MHz | |
| -do- | 21.30-21.45 MHz | 21.30-21.45 MHz | 21.30-21.45 MHz | |
| 12 m | 24.89-24.99 MHz | 24.89-24.99 MHz | 24.89-24.99 MHz | 5 |
| 10 m | 28.0-29.7 MHz | 28.0-29.7 MHz | 28.0-29.7 MHz | |

(d) General operator:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| MF | | | | |
| 160 m | 1810-1850 kHz | 1800-2000 kHz | 1800-2000 kHz | 1, 2, 3 |
| HF | | | | |
| 80 m | 3.525-3.750 MHz | 3.525-3.750 MHz | 3.525-3.750 MHz | 1 |
| 75 m | --- | 3.85-4.00 MHz | --- | 1 |
| 40 m | 7.025-7.100 MHz | 7.025-7.100 MHz | 7.025-7.100 MHz | 1 |
| -do- | --- | 7.225-7.300 MHz | --- | 1 |
| 30 m | 10.10-10.15 MHz | 10.10-10.15 MHz | 10.10-10.15 MHz | 4 |
| 20 m | 14.025-14.150 MHz | 14.025-14.15 MHz | 14.025-14.150 MHz | |
| -do- | 14.225-14.350 MHz | 14.225-14.350 MHz | 14.225-14.350 MHz | |
| 15 m | 21.025-21.200 MHz | 21.025-21.200 MHz | 21.025-21.100 MHz | |
| -do- | 21.30-21.45 MHz | 21.30-21.45 MHz | 21.30-21.45 MHz | |
| 12 m | 24.89-24.99 MHz | 24.89-24.99 MHz | 24.89-24.99 MHz | 5 |
| 10 m | 28.0-29.7 MHz | 28.0-29.7 MHz | 28.0-29.7 MHz | |

(e) Technician and Novice operator:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| HF | | | | |
| 80 m | 3.70-3.75 MHz | 3.70-3.75 MHz | 3.70-3.75 MHz | 1 |
| 40 m | 7.050-7.075 MHz | 7.10-7.15 MHz | 7.050-7.075 MHz | 1 |
| 15 m | 21.10-21.20 MHz | 21.10-21.20 MHz | 21.10-21.20 MHz | |
| 10 m | 28.1-28.5 kHz | 28.1-28.5 MHz | 28.1-28.5 MHz | |

(f) Novice operator:

| Wavelength band | ITU Region 1 | ITU Region 2 | ITU Region 3 | Limitations (See Appendix 4) |
|---|---|---|---|---|
| | | VHF | | |
| 1.25 m | --- | 222.10-223.91 MHz | --- | 1, 2, 6 |
| UHF | | | | |
| 23 cm | 1270-1295 MHz | 1270-1295 MHz | 1270-1295 MHz | 10 |

**§ 97.153 Alien control operator privileges.**

(a) The control operator privileges available to an amateur station having a control operator holding an amateur service license issued by the Government of Canada are:

(1) The terms of the *Convention Between the United States and Canada (TIAS No. 2508) Relating to the Operation by Citizens of Either Country of Certain Radio Equipment or Stations in the Other Country* ;

(2) The operating terms and conditions of the amateur service license issued by the Government of Canada;

(3) The applicable provisions of FCC rules, but not to exceed the control operator privileges of an FCC-issued Amateur Extra operator license.

(4) Any further conditions the FCC may impose.

(b) The control operator privileges available to an amateur station having a control operator holding an FCC-issued reciprocal permit for alien amateur licensee are:

(1) The terms of the bilateral agreement between the alien's government and the United States;

(2) The operating terms and conditions of the amateur service license issued by the alien's government.

(3) The applicable provisions of FCC rules, but not to exceed the control operator privileges of an FCC-issued Amateur Extra operator license;

(4) Any further conditions the FCC may impose.

(5) None, if the holder of the reciprocal permit has obtained an FCC-issued amateur operator/primary amateur station license.

(c) At any time the FCC may, in its discretion, modify, suspend, or cancel the amateur service privileges within or over any area where radio services are regulated by the FCC of any Canadian amateur service licensee or alien reciprocal permittee.

**Training operators**

**§ 97.171 Qualifying for an amateur operator license.**

Examination is required for the issuance of a new amateur operator license, and for each change in operator class.

**§ 97.173 Examination elements and standards.**

(a) A telegraphy examination must be such as to prove that the examinee has the ability to send correctly by hand and to receive correctly by ear texts in the international Morse code at not less than the prescribed speed during a minimum 5 minute test period. The examinee is responsible for knowing all the letters of the alphabet, numerals 0-9, period, comma, question mark, slant mark and prosigns ar, bt and sk.

(1) Element 1(A): 5 words per minute;

(2) Element 1(B): 13 words per minute;

(3) Element 1(C): 20 words per minute.

(b) A written examination must be such as to prove that the examinee possesses the operational and technical qualifications required to perform properly the duties of an amateur service licensee. The minimum passing score for each examination is 74%. Each written examination must be comprised of a *question set* (a series of examination questions) as follows:

(1) Element 2: At least 30 questions concerning the privileges of a Novice operator license.

(2) Element 3(A): At least 25 questions concerning the additional privileges of a Technician operator license.

(3) Element 3(B): At least 25 questions concerning the additional privileges of a General operator license.

(4) Element 4(A): At least 50 questions concerning the additional privileges of an Advanced operator license.

(5) Element 4(B): At least 40 questions concerning the additional privileges of an Amateur Extra operator license.

(c) The topics and percentage of questions in each question set must be that listed for the appropriate examination element:

| Topics | Element: 2 | 3(A) | 3(B) | 4(A) | 4(B) |
|---|---|---|---|---|---|
| (1) FCC rules for the amateur radio services | 35% | 20% | 16% | 12% | 20% |
| (2) Amateur station operating procedures | 5% | 12% | 12% | 2% | 10% |
| (3) Radio wave propagation characteristics of amateur service frequency bands | 5% | 12% | 12% | 4% | 5% |
| (4) Amateur radio practices | 15% | 16% | 20% | 8% | 10% |
| (5) Electrical principles as applied to amateur station equipment | 15% | 8% | 8% | 20% | 15% |
| (6) Amateur station equipment circuit components | 5% | 8% | 4% | 12% | 10% |
| (7) Practical circuits employed in amateur station equipment | 5% | 4% | 4% | 20% | 10% |
| (8) Signals and emissions transmitted by amateur stations | 5% | 8% | 8% | 12% | 10% |
| (9) Amateur station antennas and feed lines | 10% | 12% | 16% | 10% | 10% |

**§ 97.175 Examination requirements.**

Applicants for operator licenses must pass (or otherwise receive examination credit for) the following examination elements:

(a) Amateur Extra operator: Elements 1(C), 2, 3(A), 3(B), 4(A) and 4(B);

(b) Advanced operator: Elements 1(B), 2, 3(A), 3(B) and 4(A);

(c) General operator: Elements 1(B), 2, 3(A) and 3(B);

(d) Technician operator: Elements 1(A), 2 and 3(A);

(e) Novice operator: Elements 1(A) and 2.

**Enhancing international goodwill**

**§ 97.191 International communications.**

Transmissions between amateur stations of different countries, when permitted, must be limited to messages of a technical nature relating to tests, and, to remarks of a personal character for which, by reason of their unimportance, recourse to the public telecommunications service is not justified. Radiocommunication with an amateur station in a different country is forbidden if the administration of that country has given notice that it objects to such radiocommunications. The FCC will make public notice of current arrangements for international communications.

**Subpart C - Station Operation Standards**

**§ 97.201 Good amateur practice.**

In all respects not specifically covered by these rules each amateur station must be operated in accordance with good engineering and good amateur practice.

**§ 97.203 Frequency sharing.**

(a) In each ITU Region, each frequency band allocated to the amateur service is designated as either a secondary service or a primary service. [A station in a secondary service must not cause *harmful interference* (interference that seriously degrades, obstructs or repeatedly interrupts the operation of a radio service) to, and must accept interference from, stations in a primary service. *See* §§ 2.105 and 2.106 of the FCC rules, *United States Table of Frequency Allocations* for sharing requirements.] Where, in adjacent ITU Regions or Subregions, a band of frequencies is allocated to different services of the same category, the basic principle is the equality of right to operate. An amateur station in one ITU Region or Subregion may only transmit so as not to cause harmful interference to services in other ITU Regions or Subregions.

(b) No frequency will be assigned for the exclusive use of any amateur station. Each amateur operator must cooperate in the selection and use of amateur service frequencies in order to make the most effective use of the frequencies.

**§ 97.205 Station licensee responsibilities.**

(a) The station licensee is responsible for the proper operation of the station in accordance with the rules of this part. When the control operator is a different person than the station licensee, both persons are equally responsible for proper operation of the station.

(b) The station licensee must designate the person to be the station control operator. The FCC will presume that the station licensee is also the control operator, unless documentation to the contrary is in the station records.

(c) The station licensee must make the station and the station records available for inspection upon request by an FCC representative. When deemed necessary by an EIC to assure compliance with FCC rules, the station licensee must maintain a record of station operations containing such items of information as the EIC may require under § 0.314(x) of the FCC rules.

**§ 97.207 Control operator duties.**

(a) The control operator must ensure the proper operation of an amateur station whenever the control operator causes or allows the station to transmit.

(b) An amateur station may only be operated in the manner and to the extent permitted by the privileges authorized for the class of operator license held by the control operator.

(c) When an amateur station is transmitting, the control operator must be present at the control point, except when the station is under automatic control or in space operation.

**§ 97.209 Control point.**

Each amateur station must have at least one *control point* (the operating position of the station where the control operator function is performed).

**§ 97.211 Station control.**

(a) When an amateur station is transmitting under *local control* (the use of a control operator who directly manipulates the operating adjustments in an amateur station to achieve compliance with FCC rules), the control operator must be at the control point. Any amateur station may be under local control.

(b) When an amateur station is transmitting under *remote control* (the use of a control operator who manipulates the operating adjustments in an amateur station through a control link to achieve compliance with FCC rules), the control operator must be at the control point. Any amateur station may be under remote control. For purposes of this subpart, ancillary functions of an amateur station in repeater operation that are available to users on the input channel are not considered remote control functions of the station.

(c) When an amateur station is transmitting under *automatic control* (the use of devices and procedures in an amateur station to achieve compliance with FCC rules), the control operator need not be at the control point. Only stations in specific types of operation designated elsewhere in this part may be under automatic control. Automatic control must cease upon notification by an EIC that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the EIC.

(d) No amateur station may be operated under automatic control while transmitting third-party traffic, except a station retransmitting digital packet radio communications on the 6 m and shorter wavelength bands. Such stations must be using the *AX. 25 Amateur Packet-Radio Link-Layer Protocol, Version 2. 0*, October 1984 (or com-

patible). The retransmitted messages must originate at an amateur station that is under local control or remote control.

**§ 97.213 Authorized transmissions.**

(a) An amateur station may transmit *intercommunications* (an exchange of messages between amateur stations) only with:

(1) Another amateur station, except with one in any country whose administration has given notice that it objects to such radiocommunications.

(2) A station in another service licensed by the FCC, necessary to providing communications under §§ 97.101, 97.103, and 97.105 of the FCC rules.

(3) A United States government station, necessary to providing communications in RACES.

(4) A station that is authorized by the FCC to intercommunicate with amateur stations.

(b) An amateur station may only transmit the following types of one- way communications:

(1) *Brief* (less than 1-minute) transmissions necessary to make adjustments to the station;

(2) Brief transmissions necessary to establishing a two-way intercommunication with other stations;

(3) Transmissions while the station is in *auxiliary operation* (transmitting point-to-point communications within a system of amateur stations), such as a *control link* (wireline or radio apparatus for the control operator to manually manipulate the operating adjustments of a remotely controlled station from the control point).

(4) Transmissions while the station is in *beacon operation* (transmitting communications to facilitate measurement of radio apparatus characteristics, adjustment of radio apparatus, observation of propagation or transmission phenomena, or other related activities);

(5) Transmissions necessary to control a device from a remote location;

(6) Transmissions necessary for communications directly relating to the immediate safety of life of individuals or the immediate protection of property.

(7) Transmissions necessary for *telecommand operation* (earth-to-space communications from an amateur station that is within the major portion of the earth's atmosphere to initiate, modify or terminate functions of an amateur station in space operation);

(8) Transmissions necessary for *telemetry* (space-to-earth communications from an amateur station in space operation of results of measurements made in the station including those relating to the function of the station);

(9) Transmissions necessary to disseminate *information bulletins* (messages directed only to amateur operators that consist solely of subject matter having direct interest to the amateur service as such);

(10) Transmissions necessary for *telegraphy practice* (messages directed only to persons learning or improving proficiency in the international Morse code).

(11) Retransmission of *space shuttle communications* (communications transmitted on United States Goverment frequencies) between a space shuttle and its associated earth stations. Prior approval for such retransmissions must be obtained from the National Aeronautics and Space Administration. Such retransmissions must be for the exclusive use of amateur operators.

**§ 97.215 Third-party traffic.**

(a) An amateur station may transmit *third-party traffic* [messages from the control operator (first party) of the station to another amateur station control operator (second party) on behalf of another person (third party)] except to an amateur station in a country whose administration has not made arrangements with the United States to allow amateur stations to be used for transmitting international communications on behalf of third parties.

(b) The third party may participate in stating the third-party traffic if:

(1) The control operator is present at the control point and is continuously monitoring and supervising the third-party's participation; and

(2) The third party is not a prior amateur service licensee whose license was revoked; suspended for less than the balance of the license term and the suspension is still in effect; suspended for the balance of the license term and relicensing has not taken place; or surrendered for cancellation following notice of revocation, suspension or monetary forfeiture proceedings. The third party may not be the subject of a cease and desist order which relates to amateur service operation and which is still in effect.

(c) At the end of an exchange of international third-party traffic, the station must also transmit in the station identification procedure the call sign of the station with which third-party traffic was exchanged.

**§ 97.217 Station identification procedure.**

(a) Each amateur station, except a station in space operation or telecommand operation, must transmit its assigned call sign on its transmitting frequencies at the end of each communication, and every ten minutes or less during a communication, for the purpose of clearly making the source of the transmissions from the station known to those receiving the transmissions. No station may transmit unidentified communications or signals, or transmit in the station identification procedure a call sign not authorized to the station.

(b) The station identification must be transmitted using an emission authorized for the transmitting frequencies in one of the following ways:

(1) By a CW emission (when keyed by an automatic device used only for identification, the speed must not exceed 20 words per minute);

(2) By a phone emission in the English language (use of a nationally or internationally recognized standard phonetic alphabet as an aid for correct telephone identification is encouraged);

(3) By a RTTY emission when all or part of the communications are transmitted in the same digital code as the station identification or when the communications consist of a data emission transmitted on the VHF 6 m or shorter wavelength band.

(4) By an image emission conforming to the applicable transmission standards, either color or monochrome, of Section 73.682(a) of the FCC Rules, 47 C.F.R. § 73.682(a), when all or part of the communications are transmitted in the same image emission.

(5) By a CW or phone emission for spread spectrum communications on a narrow bandwidth frequency segment. Alternatively, by the changing of one or more pa-

rameters of the emission such that a conventional CW or phone emission receiver can be used to determine the station call sign.

(c) When an *identifier* (words, letters or numerals appended to the call sign) is included with the station call sign in the identification procedure, it must be separated from the call sign by the slant mark or by the word "stroke".

(d) When the operator license class held by the control operator exceeds those of the station licensee, the call sign assigned to the control operator's amateur station must be included after the call sign.

(e) When the amateur station control operator is using privileges on the basis of holding a CSCE, an identifier must be included after the station call sign in the identification procedure as follows:

(1) KT for Technician operator;

(2) AG for General operator;

(3) AA for Advanced operator;

(4) AE for Amateur Extra operator.

(f) When the station is operated under a reciprocal permit for alien amateur licensee or an amateur service license issued by the Government of Canada, an identifier consisting of the appropriate letter-numeral designating the station location must be included after the call sign issued to the station by the licensing country. At least once during each communication, the station must indicate in the English language the geographical location as nearly as possible by city and state, commonwealth or possession.

(g) A self-assigned identifier may be included after the call sign. The identifier must not conflict with any other identifier specified by FCC rules or by a prefix assigned to another country.

**§ 97.219 Prohibited transmissions.**

(a) No amateur station shall transmit communications that are normally transmitted by other authorized radio services, except as necessary for *emergency communications* (amateur radio communications directly relating to the immediate safety of life of individuals or the immediate protection of property).

(b) No amateur station shall transmit messages for hire, nor for communication for material compensation, direct or indirect, paid or promised. The control operator of a club station may accept compensation for such periods of time during which the station is transmitting telegraphy practice or information bulletins provided that:

(1) The station transmits the telegraphy practice and information bulletins for at least 40 hours per week;

(2) The station schedules operations on all amateur service MF and HF bands using reasonable measures to maximize coverage;

(3) The schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions;

(4) The control operator does not accept any direct or indirect compensation for periods during which the station is transmitting any other material.

(c) No amateur station shall transmit *business communications* (any transmission or communication the purpose of which is to facilitate the regular business or commercial affairs of any party), except as necessary for emergency communications, unless they are incidental to the communication. Communications to inform other amateur operators of the availability of apparatus normally used in an amateur station are not considered business communications.

(d) No amateur station shall transmit communications in order to engage in any form of *broadcasting* (the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations), nor to engage in any activity related to program production or newsgathering for broadcasting purposes.

(e) No amateur station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, unless specifically authorized in this Part. No amateur station, except a station in repeater operation or auxiliary operation, may automatically retransmit the radio signals of other amateur stations.

(f) No amateur station shall transmit communications to convey news information about an event for dissemination to the public unless all of the following conditions are present:

(1) The information is critical to protecting the immediate safety of life of individuals or the immediate protection of property;

(2) The news information is directly related to event;

(3) The event is unforeseen; and

(4) The news information cannot be transmitted by any means other than an amateur station because normal communication systems have been disrupted or because there are no other communication systems available at the place where the information is originated.

(g) No amateur station shall transmit: music; radiocommunications or messages for any purpose, or in connection with any activity, that is contrary to federal, state, or local law; messages in codes or ciphers where the intent is to obscure the meaning; obscene, indecent, or profane words, language, or meaning; and/or false or deceptive messages or signals.

(h) No amateur operator shall willfully or maliciously cause any device to transmit in a manner that causes harmful interference.

**§ 97.221 Restricted operation.**

The FCC may restrict operations as necessary to prevent harmful interference.

**Subpart D - Special Operations**

**§ 97.301 Auxiliary operation.**

(a) When an amateur station is in auxiliary operation under the provisions of this section, the identifier "a", "aux" or "auxiliary" must be included after the call sign during the station identification procedure.

(b) A station in auxiliary operation may transmit only one-way communications to stations shown in the *system network diagram* (a drawing showing each station in the system and its relationship to the other stations in the system, and to all control points). The system network diagram must be retained in the station records during any period of operation.

(c) A station in auxiliary operation may transmit only on VHF 1.25 m and shorter wavelength bands, except the 220.0-220.5 MHz segment and the UHF 431-433 MHz and 435-438 MHz segments;

(d) Where an amateur station in auxiliary operation causes harmful interference to another amateur station in *repeater operation* [other than auxiliary operation, retransmitting *automatically* (without any direct, positive action by the control operator) the radio signals of other amateur stations] or auxiliary operation, the two stations are equally and fully responsible for resolving the interference unless one station's operation is recommended by a *frequency coordinator* (an entity recognized in a local or regional area by licensees of amateur stations eligible to engage in auxiliary operation or repeater operation that recommends frequencies and, where necessary, associated operating and technical parameters for stations in auxiliary operation or repeater operation in order to avoid or minimize potential interference) and the other station's is not. In that case, the station engaged in non-coordinated operation has primary responsibility to resolve the interference.

(e) An amateur station in auxiliary operation may be under automatic control only when it is part of a system that includes a station in repeater operation also under automatic control.

(f) No station may be in auxiliary operation when the control operator or station licensee is a Novice operator.

**§ 97.303 Beacon operation.**

(a) When an amateur station is in beacon operation under the provisions of this section, the identifier "b", "bcn" or "beacon" must be included after the call sign during the station identification procedure.

(b) An amateur station in beacon operation must not concurrently transmit on more than 1 channel in the same amateur service frequency band, from the same point.

(c) The transmitter power of an amateur station in beacon operation must not exceed 100 W.

(d) An amateur station in beacon operation may be operated under automatic control when it is transmitting on:

(1) VHF 28.20-28.30 MHz, 50.06-50.08 MHz, 144.05-144.06 MHz, 220.5-220.06 MHz and 222.05-222.06 MHz segments;

(2) UHF 432.07-432.08 MHz segment;

(3) UHF 33 cm and shorter wavelength bands.

(e) Before changing the transmitting frequency, transmitter power, antenna height or directivity, or the location of an existing amateur station in beacon operation under automatic control in the *National Radio Quiet Zone* (the area bounded by $39^0$ 15'N on the north, $78^0$ 30'W on the east, $37^0$ 30'N on the south and $80^0$ 30'W on the west), or before establishing such an amateur station in the National Radio Quiet Zone, the station licensee must give written notification thereof to the Director, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(1) The notification must include the geographical coordinates of the antenna, antenna structure height, antenna directivity, proposed frequency, type of emission, and transmitter power.

(2) If an objection to the proposed operation is received by the FCC from the National Radio Astronomy Observatory at Green Bank, Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the FCC will consider all aspects of the problem and take whatever action is deemed appropriate.

(f) A station in beacon operation must cease transmissions upon notification by an EIC that the station is operating improperly or causing undue interference to other operations. Beacon operation may not resume without prior approval of the EIC.

(g) No station may be in beacon operation when the control operator or station licensee is a Novice operator.

**§ 97.305 Repeater operation.**

(a) When an amateur station is in repeater operation under the provisions of this section, the identifier "r", "rpt" or "repeater" must be included after the call sign during the station identification procedure.

(b) A station in repeater operation may retransmit only on and from the HF 10 m and shorter wavelength frequency bands except:

(1) HF 28.0-29.5 MHz segment;

(2) VHF 50.0-52.0 MHz, 144.0-144.5 MHz, 145.5-146.0 MHz and 220.0-220.5 MHz segments;

(3) UHF 431.0-433.0 MHz and 435.0-438.0 MHz segments.

(c) No station in repeater operation may concurrently transmit from the same location on more than 1 channel in the same amateur service frequency band.

(d) Where the transmissions of a station in repeater operation cause harmful interference to another station in repeater or auxiliary operation, the two stations are equally and fully responsible for resolving the interference unless the operation of one station is recommended by a frequency coordinator and the operation of the other station is not. In that case, the station engaged in non-coordinated operation has primary responsibility to resolve the interference.

(e) A station in repeater operation may be under automatic control.

(f) Transmissions from a station in repeater operation must be discontinued within 5 seconds after cessation of transmission by the user amateur station.

(g) Provisions to limit automatically the use of a station in repeater operation to only certain user amateur stations may be incorporated.

(h) A station in repeater operation may be under radio remote control only when the control link uses frequencies other than the input (receiving) frequencies of the station in repeater operation.

(i) Before changing the transmitting frequency, transmitter power, antenna height or directivity, or the location an existing station in repeater operation in the National Radio Quiet Zone or before establishing such a station in the National Radio Quiet Zone the station licensee must give written notification thereof to the Director, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(1) The notification must include the geographical coordinates of the station antenna, antenna structure height, antenna directivity, proposed frequency, type of emission, and transmitter power.

(2) If an objection to the proposed operation is received by the FCC from the National Radio Astronomy Observatory at Green Bank, Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the FCC will consider all aspects of the problem and take whatever action is deemed appropriate.

(j) No station may be in repeater operation when the control operator or station licensee is a Novice operator.

**§ 97.307 Remote control of an amateur station.**

(a) An amateur station may be under remote control where:

(1) There is a control link between the control point and the station sufficient for the control operator to perform his/her duties. The control link must be wireline, fiber optic cable or radio. If by radio, the control link must use an amateur station in auxiliary operation. (A radio control link using another telecommunication service is considered wireline.)

(2) Provisions are be incorporated to limit transmission by the station to a period of no more than 3 minutes in the event of malfunction in the control link.

(3) The station is protected against being caused to make unauthorized transmissions.

(4) A photocopy of the station license and the name, address, and telephone number of the station licensee and at least one designated control operator is posted in a conspicuous place at the station location.

(5) During any period the station is under remote control, the station records must include the names, addresses, and call signs of designated control operators and a functional block diagram of the control link and a technical explanation sufficient to describe its operation.

(b) A station in *space operation* (transmitting space-to-earth and space-to-space communications from a station that is beyond, is intended to go beyond, or has been beyond the major portion of the earth's atmosphere) is exempt from the requirements of this section.

**§ 97.309 Remote control of model craft.**

An amateur station transmitting signals to control a model craft may be operated as follows:

(a) The station identification procedure is not required for transmissions directed only to the model craft provided that a writing indicating the station call sign and the station licensee's name and address is affixed to the station transmitter.

(b) The control signals are not considered codes or ciphers intended to obscure the meaning of the communication.

(c) The transmitter power must not exceed 1 W.

**§ 97.311 Space operation.**

(a) An amateur station in space operation must be capable of effecting a cessation of transmissions by commands transmitted by a station in telecommand operation whenever such cessation is ordered by the FCC. There must be in place sufficient amateur stations, licensed by the FCC, capable of telecommand operation to effect cessation of space operation, whenever such is ordered by the FCC.

(b) The following frequencies are authorized to stations in space operation:

(1) HF 7.0-7.1 MHz and 14.00-14.25 MHz segments and the 15 m, 12 m and 10 m bands.

(2) VHF 144-146 MHz segment.

(3) UHF 1290-1270 MHz and 2400-2450 GHz segments;

(4) SHF 3.40-3.41 GHz, 5.83-5.85 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments;

(5) EHF 6 mm, 4 mm, 2 mm and 1 mm bands.

(c) A station in space operation may automatically retransmit the radio signals of other stations in earth operation and stations in space operation.

(d) Telemetry transmitted by a station in space operation may consist of specially coded messages intended to facilitate communications.

(e) Only an amateur station licensed to an Amateur Extra operator is eligible for space operation. The station licensee may permit any amateur operator to be the control operator, subject to the privileges of the control operator.

(f) The licensee of each station in space operation must give two written pre-space notifications to the Private Radio Bureau, FCC, Washington, DC 20554. Each notification must be in accord with the provisions of Articles 11 and 13 of the ITU *Radio Regulations* (Geneva, 1979).

(1) The first notification is required no less than 27 months prior to initiating space operation and must specify the information required by Appendix 4, ITU *Radio Regulations* (Geneva 1979), to the extent required by ITU Resolution No. 642.

(2) The second notification is required no less than 5 months prior to initiating space operation and must specify the information required by Appendix 3, ITU *Radio Regulations* (Geneva, 1979), to the extent required by ITU Resolution No. 642.

(g) The licensee of each station in space operation must give a written in-space operation notification to the Private Radio Bureau, FCC, Washington, DC 20554, no later than 7 days following initiation of the space operation. The notification must update the information contained in the pre-space operation notification.

(h) The licensee of each station in space operation must give a written post-space operation notification to the Private Radio Bureau, FCC, Washington, DC 20554 no later than 3 months after termination of the space operation. When the termination is ordered by the FCC, notification is required no later than 24 hours after termination.

**§ 97.313 Earth operation.**

(a) The following frequencies are authorized to stations in *earth operation* (transmitting earth-to-space communications from a station within the major portion of the earth's atmosphere):

(1) HF 7.0-7.1 MHz and 14.00-14.25 MHz segments and the HF 15 m, 12 m and 10 m bands;

(2) VHF 144-146 MHz segment;

(3) UHF 435-438 MHz, 1260-1270 MHz and 2400-2450 MHz segments;

(4) SHF 3.40-3.41 GHz, 5.65-5.67 GHz, 5.83-5.85 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments; (5) EHF 6 mm, 4 mm, 2 mm and 1 mm bands.

(b) A station in earth operation within the military areas designated in footnote US7 § 2.106 of the FCC rules, may transmit on the UHF 435-438 MHz segment with a maximum of 611 W effective radiated power (1 kW equivalent isotropically radiated power) without the authorization otherwise required by § 97.403(f) of the FCC rules. The transmitting antenna elevation angle between the lower half-power (-3 dB relative to the peak or antenna bore sight) point and the horizon must always be greater than $10^0$.

(c) Any amateur station is eligible for earth operation.

**§ 97.315 Telecommand operation.**

(a) A station in telecommand operation may transmit special codes intended to obscure the meaning of telecommand messages to the station in space operation.

(b) The following frequencies are authorized to stations in telecommand operation:

(1) HF 7.0-7.1 MHz and 14.00-14.25 MHz segments and the HF 15 m, 12 m and 10 m bands;

(2) VHF 144-146 MHz segments;

(3) UHF 435-438 MHz, 1260-1270 MHz and 2400-2450 MHz segments;

(4) SHF 3.40-3.41 GHz, 5.65-5.67 GHz, 5.83-5.85 GHz, 10.45-10.50 GHz and 24.00-24.05 GHz segments;

(5) EHF 6 mm, 4 mm, 2 mm and 1 mm bands.

(c) A station in telecommand operation within the military areas designated in footnote US7 § 2.106 of the FCC rules, may transmit on the UHF 435-438 MHz segment with a maximum of 611 W effective radiated power (1 kW equivalent isotropically radiated power) without the authorization otherwise required by § 97.403(f) of the FCC rules. The transmitting antenna elevation angle between the lower half-power (-3 dB relative to the peak or antenna bore sight) point and the horizon must always be greater than $10^0$.

(d) Any amateur station designated by the licensee of a station in space operation is eligible to conduct telecommand operation of the station in space operation.

**§ 97.317 RACES operation.**

(a) No station may transmit in RACES unless it is an FCC-licensed primary, club, or military recreation station and is certified by a civil defense organization as registered in that organization, or is an FCC-licensed RACES station. No person may be the control operator of a RACES station, or may be the control operator of an amateur station transmitting in RACES unless that person holds a FCC-issued amateur operator license and is certified by a civil defense organization as enrolled in that organization.

(b) The frequencies and emissions authorized to the control operator are available to stations transmitting communications in RACES on a shared basis with the amateur service. In the event of an emergency which necessitates the invoking of the President's War Emergency Powers under the provisions of Section 706 of the Communications Act of 1934, as amended, 47 U.S.C. § 606, RACES stations and amateur stations participating in RACES may only transmit on the following frequencies:

(1) HF 1800-1825 kHz, 1975-2000 kHz, 3.50-3.55 MHz, 3.93-3.98 MHz, 3.984-4.000 MHz, 7.079-7.125 MHz, 7.245-7.255 MHz, 10.10-10.15 MHz, 14.047-14.053 MHz, 14.22-14.23 MHz, 14.331-14.350 MHz, 21.047-21.053 MHz, 21.228-21.267 MHz, 28.55-28.75 MHz, 29.237-29.273 MHz and 29.45-29.65 MHz segments;

(2) VHF 50.35-50.75 MHz, 52-54 MHz, 144.50-145.71 MHz and 146-148 MHz segments and 1.25 m band;

(3) UHF 70 cm and 23 cm bands, and UHF 2390-2450 MHz segment.

(4) Channels at 3.997 MHz and 53.30 MHz may be used in emergency areas when required to make initial contact with a military unit and for communications with military stations on matters requiring coordination.

(c) A RACES station may only intercommunicate with:

(1) Another RACES station;

(2) An amateur station registered with a civil defense organization;

(3) A station in the Disaster Communications Service (Part 99, FCC rules);

(4) A United States Government station authorized by the responsible agency to intercommunicate with RACES stations;

(5) A station in a service regulated by the FCC whenever such intercommunication is authorized by the FCC;

(d) An amateur station registered with a civil defense organization may only intercommunicate with:

(1) A RACES station licensed to the civil defense organization with which the amateur station is registered;

(2) The following stations upon authorization of the responsible civil defense official for the organization in which the amateur station is registered:

(A) A RACES station licensed to another civil defense organization;

(B) An amateur station registered with the same or another civil defense organization;

(C) A station in the Disaster Communications Service;

(D) A United States Government station authorized by the responsible agency to intercommunicate with RACES stations;

(E) A station in a service regulated by the FCC whenever such intercommunication is authorized by the FCC;

(e) All communications transmitted in RACES must be specifically authorized by the civil defense organization for the area served. Only civil defense communications of the following types may be transmitted:

(1) Messages concerning impending or actual conditions jeopardizing the public safety, or affecting the national defense or security during periods of local, regional, or national civil emergencies.

(2) Messages directly concerning the immediate safety of life of individuals, the immediate protection of property, maintenance of law and order, alleviation of human suffering and need, and the combating of armed attack or sabotage.

(3) Messages directly concerning the accumulation and dissemination of public information or instructions to the civilian population essential to the activities of the civil defense organization or other authorized governmental or relief agencies.

(4) Communications for training drills and tests necessary to ensure the establishment and maintenance of orderly and efficient operation of the RACES as ordered by

the responsible civil defense organization served. Such tests and drills may not exceed a total time of 1 hour per week.

(5) Brief one-way transmissions for the testing and adjustment of equipment.

(f) No station in the RACES may transmit messages for hire, nor provide communications for material compensation, direct or indirect, paid or promised.

(g) All messages that are transmitted in connection with drills or tests shall be clearly identified as such by use of the words "drill" or "test," as appropriate, in the body of the messages.

**Subpart E - Technical Standards**

**§ 97.401 Purity of transmissions.**

(a) No amateur station transmission shall occupy more bandwidth than necessary for the information rate and emission type being transmitted, in accordance with good amateur practice.

(b) Emissions resulting from modulation must be confined to the transmitting band available to the control operator. Emissions outside the necessary bandwidth must not cause splatter or keyclick interference to operations on adjacent frequencies.

(c) All spurious emissions from an amateur station transmitter must be reduced to the greatest extent practicable. If any spurious emission, including chassis or power line radiation, causes harmful interference to the reception of another radio station, the licensee of the interfering amateur station may be required to take steps to eliminate the interference, in accordance with good engineering practice.

(d) The mean power of any spurious emission from an amateur station transmitter or *external RF power amplifier* (a device that when used in conjunction with a transmitter as a signal source, is capable of amplification of that signal, and which is not an integral part of the transmitter as manufactured) transmitting on a frequency below 30 MHz must be at least 40 dB below the mean power of the fundamental without exceeding the power of 50 mW. For a transmitter of mean power less than 5 W, the attenuation must be at least 30 dB. A transmitter built before April 15, 1977 or first marketed before January 1, 1978 is exempt from this requirement.

(e) The mean power of any spurious emission from an amateur station transmitter or external RF power amplifier transmitting on a frequency between 30-225 MHz must be at least 60 dB below the mean power of the fundamental. For a transmitter having a mean power of 25 W or less, the mean power of any spurious radiation supplied to the antenna transmission line must be at least 40 dB below the mean power of the fundamental without exceeding the power of 25 uW, but need not be reduced below the power of 10 uW. A transmitter built before April 15, 1977 or first marketed before January 1, 1978, is exempt from this requirement.

**§ 97.403 Maximum transmitting power.**

(a) An amateur station must use the minimum *transmitter power* (the average power during one RF cycle at the crest of the modulation envelope under normal operating conditions that is present at the antenna terminals where the antenna transmission line, or the antenna if no transmission line, is connected) necessary to carry out the desired communications.

(b) No station may transmit with a transmitter power exceeding 1.5 kW. Until June 2, 1990, a station may transmit emission A3E with transmitter power exceeding 1.5 kW provided the power input (both RF and direct current) to the final amplifying stage supplying RF power to the antenna feed line does not exceed 1 kW, exclusive of power for heating the cathodes of vacuum tubes.

(c) No station may transmit with a transmitter power exceeding 200 W on:

(1) HF 3.70-3.75 MHz, 7.10-7.15 MHz, 10.10-10.15 MHz and 21.1-21.2 MHz segments.

(2) HF 28.1-28.5 MHz segment when the control operator is a Novice or Technician operator.

(3) HF 7.050-7.075 MHz segment when the station is within ITU Regions 1 or 3.

(d) No station may transmit with a transmitter power exceeding 25 W on the VHF 1.25 m band when the control operator is a Novice operator.

(e) No station may transmit with a transmitter power exceeding 5 W on the UHF 23 cm band when the control operator is a Novice operator.

(f) No station may transmit with a transmitter power exceeding 50 watts on the UHF 70 cm band from an area specified in footnote US7 § 2.106 of the FCC rules, unless expressly authorized by the FCC after mutual agreement, on a case-by-case basis, between the EIC of the appropriate field facility and the *MAFC* (military area frequency coordinator) at the applicable military base.

(g) No station may transmit with a transmitter power exceeding 50 watts on the UHF 33 cm band from within 241 km of the boundaries of the White Sands Missile Range. Its boundaries are those portions of Texas and New Mexico bounded on the south by latitude $31^0$ 41' North, on the east by longitude $104^0$ 11' West, on the north by latitude $34^0$ 30' North, and on the west by longitude $107^0$ 30' West.

**§ 97.405 Digital communications.**

(a) An amateur station may be operated under automatic control while transmitting digital communications on the VHF 6 m or shorter wavelength bands.

(b) Digital communication transmissions must not be used for the purpose of obscuring the meaning of any communication.

(c) When deemed necessary by an EIC to assure compliance with FCC rules, an amateur station must:

(1) Cease the transmission of digital codes;

(2) Restrict the transmission of digital codes to the extent instructed;

(3) Maintain a record, convertible to the original *information* (voice, data, image, etc.), of all coded communications transmitted.

**§ 97.407 Spread spectrum communications.**

(a) Spread spectrum transmissions are authorized only for communications between points within areas where the amateur service is regulated by the FCC. Spread spectrum transmissions must not be used for the purpose of obscuring the meaning of any communication.

(b) Amateur stations transmitting spread spectrum must not cause harmful interference to stations employing other authorized emissions, and must accept all interference caused by stations employing other authorized emissions. (For the purposes of this paragraph, unintended triggering of carrier operated repeaters is not considered to be harmful interference.)

(c) Only the following types of spread spectrum transmissions are authorized (hybrid spread spectrum transmissions involving both spreading techniques are prohibited):

(1) *Frequency hopping.* (The carrier of the transmitted signal is modulated with unciphered information and changes frequency at fixed intervals under the direction of a high speed code sequence.)

(2) *Direct sequence.* (The information is modulo-2 added to a high speed code sequence. The combined information and code are then used to modulate the RF carrier. The high speed code sequence dominates the modulation function, and is the direct cause of the wide spreading of the transmitted signal.)

(d) The only spreading sequences that are authorized must be from the output of one binary linear feedback shift register (which may be implemented in hardware or software).

(1) Only the following sets of connections may be used:

| Number of stages in shift register | Taps used in feedback |
|---|---|
| 7 | 7, 1 |
| 13 | 13, 4, 3, 1 |
| 19 | 19, 5, 2, 1 |

(2) The shift register must not be reset other than by its feedback during an individual transmission. The shift register output sequence must be used without alteration.

(3) The output of the last stage of the binary linear feedback shift register must be used as follows:

(i) For frequency hopping transmissions using x frequencies, n consecutive bits from the shift register must be used to select the next frequency from a list of frequencies sorted in ascending order. Each consecutive frequency must be selected by a consecutive block of n bits. (Where n is the smallest integer greater than log2 x.)

(ii) For direct sequence transmissions using m-ary modulation, consecutive blocks of log2 m bits from the shift register must be used to select the transmitted signal during each interval.

(e) The station records must document all spread spectrum transmissions and must be retained for a period of 1 year following the last entry. The station records must include sufficient information to enable the FCC, using the information contained therein, to demodulate all transmissions. The station records must contain at least the following:

(1) A technical description of the transmitted signal.

(2) Pertinent parameters describing the transmitted signal including the frequency or frequencies of operation and, where applicable, the chip rate, the code rate, the spreading function, the transmission protocol(s) including the method of achieving synchronization, and the modulation type;

(3) A general description of the type of information being conveyed, (voice, text, memory dump, facsimile, television, etc.);

(4) The method and, if applicable, the frequency or frequencies used for station identification.

(5) The date of beginning and the date of ending use of each type of transmitted signal.

(f) When deemed necessary by an EIC to assure compliance with the rules of this part, a station licensee must:

(1) Cease spread spectrum transmissions;

(2) Restrict spread spectrum transmissions to the extent instructed;

(3) Maintain a record, convertible to the original information (voice, text, image, etc.) of all spread spectrum communications transmitted.

(g) The transmitter power must not exceed 100 W.

**§ 97.409 Type acceptance of external RF power amplifiers.**

(a) No more than 1 unit of 1 model of an external RF power amplifier capable of operation below 144 MHz may be constructed or modified during any calendar year by an amateur operator for use at an amateur station without a grant of type acceptance. No amplifier capable of operation below 144 MHz may be constructed or modified by a non-amateur operator without a grant of type acceptance from the FCC.

(b) Any external RF power amplifier or *external RF power amplifier kit* (a number of electronic parts, usually provided with a schematic diagram or printed circuit board, which, when assembled in accordance with instructions, results in an external RF power amplifier, even if additional parts are required to complete assembly) marketed (see in § 2.815 of the FCC rules), manufactured, imported or modified for use in an amateur station or attached at any amateur station must be type accepted for use in the amateur service in accordance with Subpart J of Part 2 of the FCC rules. This requirement does not apply if one or more of the following conditions are met:

(1) The amplifier is not capable of operation on frequencies below 144 MHz. For the purpose of this part, an amplifier will be deemed to be incapable of operation below 144 MHz if it is not capable of being easily modified to increase its amplification characteristics below 120 MHz and either:

(i) The mean output power of the amplifier decreases, as frequency decreases from 144 MHz, to a point where 0 dB or less gain is exhibited at 120 MHz; or

(ii) The amplifier is not capable of amplifying signals below 120 MHz even for brief periods without sustaining permanent damage to its amplification circuitry.

(2) The amplifier was originally purchased before April 28, 1978, by an amateur operator for use at that licensee's amateur station.

(3) The amplifier was:

(i) Constructed by the licensee, not from an external RF power amplifier kit, for use at the licensee's amateur station; or

(ii) Modified by the licensee for use at the licensee's amateur station.

(4) The amplifier is sold by an amateur radio operator to another amateur radio operator or to a dealer.

(5) The amplifier is purchased in used condition by an equipment dealer from an amateur radio operator and the amplifier is further sold to another amateur radio operator for use at that operator's amateur station.

(6) The amplifier was manufactured before April 28, 1978 and has been issued a marketing waiver by the FCC.

(c) A list of type accepted equipment may be inspected at FCC headquarters in Washington, DC or at any FCC field location. Any external RF power amplifier appearing on this list as type accepted for use in the amateur service may be marketed for use in the amateur service.

**§ 97.411 Standards for type acceptance of external RF power amplifiers.**

(a) To receive a grant of type acceptance under this part, the amplifier must satisfy the spurious emission limitations of § 97.401(d) or (e) of the FCC rules, as applicable, when the amplifier is:

(1) Operated at its full output power;

(2) Placed in the "standby" or "off" positions, but still connected to the transmitter; and

(3) Driven with at least 50 W mean RF input power (unless a higher drive level is specified).

(b) To receive a grant of type acceptance under this part, the amplifier must not be capable of operation on any frequency or frequencies between 24 MHz and 35 MHz. The amplifier will be deemed incapable of such operation if it:

(1) Exhibits no more than 6 dB gain between 24 MHz and 26 MHz and between 28 MHz and 35 MHz. (This gain will be determined by the ratio of the input RF driving signal (mean power measurement) to the mean RF output power of the amplifier); and

(2) Exhibits no amplification (0 dB gain) between 26 MHz and 28 MHz.

(c) Type acceptance may be denied when denial would prevent the use of these amplifiers in services other than the amateur service. The following features will result in dismissal or denial of an application for type acceptance:

(1) Any accessible wiring which, when altered, would permit operation of the amplifier in a manner contrary to FCC rules;

(2) Circuit boards or similar circuitry to facilitate the addition of components to change the amplifier's operating characteristics in a manner contrary to FCC rules;

(3) Instructions for operation or modification of the amplifier in a manner contrary to FCC rules;

(4) Any internal or external controls or adjustments to facilitate operation of the amplifier in a manner contrary to the FCC rules;

(5) Any internal RF sensing circuitry or any external switch, the purpose of which is to place the amplifier in the transmit mode;

(6) The incorporation of more gain in the amplifier than is necessary to operate in the amateur service. For purposes of this paragraph, the amplifer must:

(i) Not be capable of achieving designed output power when driven with less than 50 W mean RF input power;

(ii) Not be capable of amplifying the input RF driving signal by more than 15 dB, unless the amplifier has a designed transmitter power of less than 1.5 kW. In such a case, gain must be reduced by the same number of dB as the transmitter power relationship to 1.5 kW. (This gain limitation is determined by the ratio of the input RF driving signal to the RF output power of the amplifier where both signals are expressed in peak envelope power or mean power.);

(iii) Not exhibit more gain than permitted by paragraph (d)(6)(ii) of this section when driven by an RF input signal of less than 50 W mean power; and

(iv) Be capable of sustained operation at its designed power level.

(7) Any attenuation in the input of the amplifer which, when removed or modified, would permit the amplifier to function at its designed transmitter power when driven by an RF frequency input signal of less than 50 W mean power.

(8) Any other features designed to facilitate operation in a telecommunication service other than the Amateur Radio Services, such as the Citizens Band (CB) Radio Service.

**Subpart F - Qualifying Examination Systems**

**Operator License Examinations**

**§ 97.501 Examination administration procedures.**

(a) Each examination for an amateur operator license must be administered at a location and a time specified by the administering VEs. Each administering VE must be present and observe the examinee throughout the entire examination. The administering VEs are responsible for the proper conduct and necessary supervision of each examination. The administering VEs must immediately terminate the examination upon failure of the examinee to comply with the instructions.

(b) Each examinee must comply with the instructions given by the administering VEs.

(c) No examination that has been compromised shall be administered to any examinee. Neither the same telegraphy message nor the same question set may be readministered to the same examinee.

(d) Upon completion of each examination element, the administering VEs must immediately grade the examinee's answers. The administering VEs are responsible for determining the correctness of the examinee's answers.

(e) When the examinee is credited for all examination elements required for the operator license sought, the administering VEs must certify on the examinee's application form that the applicant is qualified for the license and report the basis for the qualification.

(f) When the examinee does not score a passing grade on an examination element, the administering VEs must return the application form to the examinee and inform the examinee of the grade.

(g) VEs must accommodate examinees whose physical disabilities require special procedures.

(h) The FCC may:

(1) Administer any examination element itself;

(2) Readminister any examination element previously administered under the VEC system, either itself or under the supervision of VEs designated by the FCC; or

(3) Cancel the operator license of any licensee who fails to appear for readministration of an examination when directed by the FCC, or who does not successfully complete any required element which is readministered. In an

instance of such cancellation, the person will be issued an operator license consistent with completed examination elements that have not been invalidated by not appearing for or by failing the examination upon readministration.

**§ 97.503 Examination preparation.**

(a) Each telegraphy message and each written question set administered to an examinee must be prepared by a VE holding an FCC-issued operator license as follows:

(1) Elements 1(B), 1(C), 4(A) and 4(B): Amateur Extra operator;

(2) Element 3(B): Amateur Extra or Advanced operator;

(3) Elements 1(A) and 3(A): Amateur Extra, Advanced or General operator;

(4) Element 2: Amateur Extra, Advanced, General or Technician operator.

(b) Each question set administered to an examinee must utilize questions taken from the applicable *VEC* (volunteer-examiner coordinator) question pool.

(c) Each telegraphy message and each written question set administered to an examinee for a Technician, General, Advanced, or Amateur Extra operator license must be prepared by the administering VEs according to instructions from the coordinating VEC or obtained by the administering VEs from the coordinating VEC.

(d) Each telegraphy message and each written question set administered to an examinee for a Novice operator license must be prepared by the administering VEs.

(e) A telegraphy examination must consist of a message sent in the international Morse code at no less than the prescribed speed for 5 minutes. No message known to the examinee may be administered in a telegraphy examination. Each 5 letters of the alphabet must be counted as 1 word. Each numeral, punctuation mark and prosign must be counted as 2 letters of the alphabet.

**§ 97.505 Examination element credit.**

(a) The administering VEs must give credit as specified below to an examinee holding any of the following documents:

(1) An unexpired (or within the grace period) FCC-issued amateur operator license: Elements required for the license held.

(2) A CSCE: Each element the CSCE indicates the examinee passed within the previous 365 days.

(3) A photocopy of a FCC Form 610 which was submitted to the FCC indicating the examinee qualified for a Novice operator license within the previous 365 days: Elements 1(A) and 2.

(4) An unexpired (or expired less than 5 years) FCC-issued commercial radiotelegraph operator license or permit: Element 1(A), 1(B) or 1(C).

(b) No examination credit, except as herein provided, shall be allowed on the basis of holding or having held any other license.

**§ 97.507 Technician, General, Advanced and Amateur Extra operator examination administration.**

(a) Each examination for a Technician, General, Advanced or Amateur Extra operator license must be coordinated by a VEC. Each administering VE must be accredited by the coordinating VEC.

(b) Each examination for a Technician operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra or Advanced operator license.

(c) Each examination for a General, Advanced or Amateur Extra operator license must be administered by 3 administering VEs, each of whom must hold an FCC-issued Amateur Extra operator license.

(d) The administering VEs must make a public announcement before administering an examination for Technician, General, Advanced or Amateur Extra operator license. The number of candidates at any examination may be limited.

(e) The administering VEs must issue a CSCE to an examinee who scores a passing grade on an examination element.

(f) Within 10 days of the administration of a successful examination for the Technician, General, Advanced or Amateur Extra operator license, the administering VEs must submit the examinee's application to the coordinating VEC.

**§ 97.509 Novice operator examination administration.**

(a) Each examination for a Novice operator license must be administered by 2 VEs. The VEs do not have to be accredited. Each administering VE must hold a current FCC-issued Amateur Extra, Advanced or General operator license.

(b) Within 10 days of the administration of a successful examination for a Novice operator license, the administering VEs must submit the examinee's completed application form to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

**§ 97.511 Volunteer examiner requirements.**

(a) Each administering VE must be at least 18 years of age.

(b) Any person who owns a significant interest in, or is an employee of, any company or other entity that is engaged in the manufacture or distribution of equipment used in connection with amateur radio transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur station operator licenses, is ineligible to be an administering VE. An employee who does not normally communicate with that part of an entity engaged in the manufacture or distribution of such equipment, or in the preparation or distribution of any publication used in preparation for obtaining amateur operator licenses, is eligible to be an administering VE.

(c) No person may be a VE if that person's amateur station license or amateur operator license has ever been revoked or suspended.

(d) No VE may administer an examination to that VE's spouse, parent, child, stepchild, brother, sister, father-in-law, mother-in-law, brother-in- law, sister-in-law, grandparent or grandchild.

**§ 97.513 Volunteer examiner conduct.**

No VE may administer or certify any examination by fraudulent means or for monetary or other consideration including reimbursement in any amount in excess of that permitted. Violation of this provision may result in the revocation of the VE's amateur station license and the suspension of the VE's amateur operator license.

**Volunteer-examiner coordinators**

**§ 97.521 Agreement required.**

No organization may serve as a VEC unless it has entered into a written agreement with the FCC to do so. The VEC must abide by the terms of the agreement.

**§ 97.523 VEC qualifications.**

In order to be eligible to propose to the FCC to be a VEC, the entity must:

(a) Be an organization that exists for the purpose of furthering the amateur service;

(b) Be capable of serving as a VEC in the VEC region proposed;

(c) Agree to coordinate examinations for Technician, General, Advanced, and Amateur Extra operator licenses;

(d) Agree to assure that for any examination every examinee qualified under these rules is registered without regard to race, sex, religion, national origin or membership (or lack thereof) in any amateur service organization;

(e) Not be engaged in the manufacture or distribution of equipment used in connection with amateur station transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur licenses unless persuasive showing is made to the FCC that preventive measures have been taken to preclude any possible conflict of interest.

**§ 97.525 Coordinating examinations.**

(a) A VEC may coordinate examinations administered in the VEC region it serves. A VEC may also coordinate examinations administered outside of the other VEC regions. VECs must coordinate the efforts of VEs in preparing and administering examinations according to instructions provided by the FCC.

(b) At the completion of each examination coordinated, the coordinating VEC must collect the examinee's application form and test results from the administering VEs. The VEC must screen and forward all completed and authentic applications within 10 days of its receipt from the administering VEs to: FCC, P.O. Box 1020, Gettysburg, PA 17326.

(c) Each VEC must make any examination records available to the FCC upon request.

**§ 97.527 VEC question pools.**

(a) All VECs must cooperate in maintaining one standard question pool for each written examination element. Each VEC question pool must contain at least ten times the number of questions required for a single examination. Each question pool must be published and made available to the public prior to its use for making a question set. No question may be administered in a VEC-coordinated examination unless it appears on the appropriate standard question pool.

(b) Each question on each VEC question pool must be prepared by a VE holding the required FCC-issued operator license. *See* § 97.503(a) of the FCC rules.

**§ 97.529 Accrediting VEs.**

(a) No VEC may accredit a person as a VE if:

(1) The person does not meet minimum VE statutory qualifications or minimum qualifications as prescribed by the rules;

(2) The FCC does not accept the voluntary and uncompensated services of the person;

(3) The VEC determines that the person is not competent to perform the VE functions;

(4) The VEC determines that questions of the person's integrity or honesty could compromise the examinations.

(b) Each VEC must seek a broad representation of amateur operators to be VEs. No VEC may discriminate in accrediting VEs on the basis of race, sex, religion or national origin; nor on the basis of membership (or lack thereof) in an amateur service organization; nor on the basis of the person accepting or declining to accept reimbursement.

**Examination Expense Reimbursement**

**§ 97.541 Reimbursement for expenses.**

(a) VEs and VECs may be reimbursed by examinees for out-of-pocket expenses incurred in preparing, processing, or administering an examination for a Technician, General, Advanced, or Amateur Extra operator license.

(b) The maximum amount of reimbursement from any one examinee for any one examination at a particular session regardless of the number or examination elements taken must not exceed that announced by the FCC in a Public Notice. (The basis for the maximum fee is $4.00 for 1984 adjusted annually each January 1 thereafter for changes in the Department of Labor Consumer Price Index.)

(c) No reimbursement may be accepted by any VE or VEC for preparing, processing, or administering an examination for a Novice operator license.

(d) Each VE and each VEC accepting reimbursement must maintain records of out-of-pocket expenses and reimbursements for each examination session. Written certifications must be filed with the FCC each year that all expenses for the period from January 1 to December 31 of the preceding year for which reimbursement was obtained were necessarily and prudently incurred.

(e) The expense and reimbursement records must be retained by each VE and each VEC for 3 years and be made available to the FCC upon request.

(f) Each VE must forward the certification by January 15 of each year to the coordinating VEC for the examinations for which reimbursement was received. Each VEC must forward all such certifications and its own certification to the FCC on or before January 31 of each year.

(g) Each VEC must disaccredit any VE failing to provide the certification. The VEC must advise the FCC on January 31 of each year of any VE that it has disaccredited for this reason.

**Appendix 1 -- Places Where Amateur Radio Services Are Regulated By The FCC.**

(a) In ITU Region 2, the amateur service is regulated by the FCC within the territorial limits of the fifty United States, District of Columbia, Caribbean Insular areas [Commonwealth of Puerto Rico, United States Virgin Islands (50 islets and cays) and Navassa Island], and John-

ston Island (Islets East, Johnston, North and Sand) and Midway Island (Islets Eastern and Sand) in the Pacific Insular areas.

(b) In ITU Region 3, the amateur service is regulated by the FCC within the Pacific Insular territorial limits of American Samoa (seven islands), Baker Island, Commonwealth of Northern Mariannas Islands, Guam Island, Howland Island, Jarvis Island, Kingman Reef, Palmyra Island (more than 50 islets) and Wake Island (Islets Peale, Wake and Wilkes).

**Appendix 2 -- VEC Regions.**

Region 1: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont;

Region 2: New Jersey and New York;

Region 3: Delaware, District of Columbia, Maryland and Pennsylvania;

Region 4: Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, Tennessee and Virginia;

Region 5: Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma and Texas;

Region 6: California;

Region 7: Arizona, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming;

Region 8: Michigan, Ohio and West Virginia;

Region 9: Illinois, Indiana and Wisconsin;

Region 10: Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota;

Region 11: Alaska;

Region 12: Caribbean Insular areas;

Region 13: Hawaii and Pacific Insular areas.

**Appendix 3 -- Glossary of Terms**

The definitions of terms used in Part 97 are:

*Authorized bandwidth*. The width of the frequency band outside of which the mean power of the total emission must be attenuated at least 26 decibels below the mean power of the total emission.

*Automatic control*. The use of devices and procedures in an amateur station to achieve compliance with FCC rules.

*Auxiliary operation*. Transmitting point-to-point communications within a system of amateur stations.

*Beacon operation*. Transmitting communications to facilitate measurement of radio apparatus characteristics, adjustment of radio apparatus, observation of propagation or transmission phenomena, or other related activities.

*Brief*. Less than 1-minute.

*Business communications*. Any transmission or communication the purpose of which is to facilitate the regular business or commercial affairs of any party.

*Control link*. Wireline or radio apparatus for the control operator to manipulate the operating adjustments of a remotely controlled station from the control point.

*Control point*. The operating position of the station where the control operator function is performed.

*CSCE*. Certificate of successful completion of an examination.

*CW*. International Morse code telegraphy emissions having A, C, H, J or R as the first symbol; 1 as the second symbol; A or B as the third symbol; J2A and J2B.

*Data*. Telemetry, telecommand, and data emissions having A, C, D, F, G, H, J or R as the first symbol; 1 as the second symbol; D as the third symbol; and emission J2D.

*Earth operation*. Transmitting earth-to-space communications from a station within the major portion of the earth's atmosphere.

*EIC*. Engineer-in-Charge of an FCC Field Facility.

*Emergency communications*. Amateur radio communications directly relating to the immediate safety of life of individuals or the immediate protection of property.

*External RF power amplifier*. A device that when used in conjunction with a transmitter as a signal source, is capable of amplification of that signal, and which is not an integral part of the transmitter as manufactured.

*Frequency coordinator*. An entity recognized in a local or regional area by licensees of amateur stations eligible to engage in auxiliary operation or repeater operation that recommends frequencies and, where necessary, associated operating and technical parameters for stations in auxiliary operation or repeater operation in order to avoid or minimize potential interference.

*Frequency hopping*. The carrier of the transmitted signal is modulated with unciphered information and changes frequency at fixed intervals under the direction of a high speed code sequence.

*Harmful interference*. Interference that seriously degrades, obstructs or repeatedly interrupts the operation of a radio service.

*Identifier*. Words, letters or numerals appended to the call sign during the station identification procedure.

*Image*. Facsimile and television emissions having A, C, D, F, G, H, J, or R as the first symbol; 1, 2 or 3 as the second symbol; C or F as the third symbol; and B as the first symbol; 7, 8 or 9 as the second symbol; W as the third symbol.

*Information*. Voice, data, image, etc.

*Information bulletins*. Messages directed only to amateur operators that consist solely of subject matter having direct interest to the amateur service as such.

*Intercommunications*. An exchange of messages between amateur stations.

*Local control*. The use of a control operator who directly manipulates the operating adjustments in an amateur station to achieve compliance with the FCC rules.

*MAFC*. Military area frequency coordinator.

*MCW*. Tone-modulated international Morse code telegraphy emissions having A, C, D, F, G, H or R as the first symbol; 2 as the second symbol; A or B as the third symbol.

*National Radio Quiet Zone*. The area in Maryland, Virginia and West Virginia bounded by $39^0$ 15'N on the north, $78^0$ 30'W on the east, $37^0$ 30'N on the south and $80^0$ 30'W on the west.

*Phone*. Speech emissions having A, C, D, F, G, H, J or R as the first symbol; 1, 2 or 3 as the second symbol; E as the third symbol; and speech emissions having B as the first symbol; 7, 8 or 9 as the second symbol; E as the third symbol.

*Pulse*. Emissions having K, L, M, P, Q, V or W as the first symbol; 0, 1, 2, 3, 7, 8, 9 or X as the second symbol; N, A, B, C, D, E, F, W or X as the third symbol.

*Question set*. A series of examination questions.

*Remote control.* The use of a control operator who manipulates the operating adjustments in an amateur station through a control link to achieve compliance with the FCC rules.

*Repeater operation.* Other than auxiliary operation, retransmitting automatically the radio signals of other amateur stations.

*RF.* Radio frequency.

*RTTY.* Narrow-band direct-printing emissions using International Telegraph Alphabet Number 2, American Standard Code for Information Interchange ANSI X3.4-1977], or International Radio Consultative Committee Recommendation CCIR 476-2 [1978], 476-3 [1982], 476-4 [1986] or 625 [1986], as appropriate, Mode A or B, having A, C, D, F, G, H, J or R as the first symbol; 1 as the second symbol; B as the third symbol; and emission J2B.)

*Space operation.* Transmitting space-to-earth and space-to-space communications from a station that is beyond, is intended to go beyond, or has been beyond the major portion of the earth's atmosphere.

*SS.* Spread-spectrum using bandwidth-expansion modulation emissions A, C, D, F, G, H, J or R as the first symbol; X as the second symbol; X as the third symbol.

*System network diagram.* A drawing showing each station in the system and its relationship to the other stations in the system, and to all control points.

*Telegraphy practice.* Messages directed only to persons learning or improving proficiency in the international Morse code.

*Test.* Emissions containing no information or no modulation; test does not include pulse emissions with no information or no modulation unless pulse emissions are also authorized in the frequency band.

*Third-party traffic.* Messages from the control operator (first party) of the station to another amateur station control operator (second party) on behalf of another person (third party).

*Transmitter power.* The average power during one RF cycle at the crest of the modulation envelope under normal operating conditions that is present at the antenna terminals where the antenna transmission line, or the antenna if no transmission line, is connected.

*VEC.* Volunteer-examiner coordinator.

*VEs.* Volunteer examiners.

**Appendix 4 – Frequency Sharing Requirements.**

The following is a summary of the frequency sharing requirements for the amateur service and the amateur-satellite service. *See* §§ 2.105 and 2.106 of the FCC rules, *United States Table of Frequency Allocations* for complete requirements. Also see § 97.151 of the FCC rules.

(1) Where, in adjacent regions or subregions, a band of frequencies is allocated to different services of the same category, the basic principle is the equality of right to operate. Accordingly, the stations of each service in one region must operate so as not to cause harmful interference to services in the other regions or subregions. (*See* ITU *Radio Regulations*, RR 346 (Geneva, 1979).)

(2) Amateur stations in the 1900-2000 kHz segment of the 160 m band, the 1.25 m band, the 70 cm band, the 33 cm band, the 13 cm band, the 9 cm band, the 5 cm band, the 3 cm band, the 24.05-24.24 GHz segment of the 1.2 cm band, the 76-81 GHz segment of the 4 mm band, the 144-149 GHz segment of the 2 mm band and the 241-248 GHz segment of the 1 mm band must not cause harmful interference to, and are not protected from interference due to the operation of, the government radiolocation service.

(3) Amateur stations in the 1900-2000 kHz segment of the 160 m band, the 3 cm band, the 76-81 GHz segment of the 4 mm band, the 144-149 GHz segment of the 2 mm band and the 241-248 GHz segment of the 1 mm band must not cause harmful interference to, and are not protected from interference due to the operation of, stations in the non-government radiolocation service.

(4) Amateur stations in the 30 meter band must not cause harmful interference to stations authorized by other nations in the fixed service. Amateur stations shall make all necessary adjustments (including termination of transmissions) if harmful interference is caused.

(5) Amateur stations in the 12 meter band must not cause harmful interference to stations authorized by other nations in the fixed service. Amateur stations must make all necessary adjustments (including termination of transmission) if harmful interference is caused. (Assignments in the fixed service in this band shall be terminated no later than 1 July 1989.

(6) The 1.25 m band is allocated to the amateur, fixed and mobile services in the United States on a co-primary basis. The basic principle that applies is the equality of right to operate. Amateur, fixed and mobile stations must operate so as not to cause harmful interference to each other.

(7) In the 70 cm band:

(a) No amateur station shall operate north of Line A in the 420-430 MHz segment.

(b) The 420-430 MHz segment is allocated to the amateur service in the United States on a secondary basis, but is allocated is the fixed and mobile (except aeronautical mobile) services in the International Table of allocations on a primary basis. Amateur stations operating in this band must not cause harmful interference to, are not protected from interference due to the operation of, stations authorized by other nations in the fixed and mobile (except aeronautical mobile) services.

(c) The 430-440 MHz segment is allocated to the amateur service on a secondary basis in ITU Regions 2 and 3. Amateur stations in this band in ITU Regions 2 and 3 must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the radiolocation service. In ITU Region 1, the 430-440 MHz segment is allocated to the amateur service on a co-primary basis with the radiolocation service. As between these two services in this band in Region 1, the basic principle that applies is the equality of right to operate. Amateur stations authorized by the United States and radiolocation stations authorized by other nations in Region 1 must operate so as not to cause harmful interference to each other.

(d) Amateur stations in the 449.5-450 MHz segment must not cause interference to and are not protected from interference due to the operation of stations in the space operation service, the space research service or for space telecommand.

(8) In the 33 cm band:

(a) Amateur stations shall not operate within the States of Colorado and Wyoming, bounded by the area of $39^0$ N to $42^0$ N and longitude $105^0$ W to $108^0$ W. This band is

allocated on a secondary basis to the amateur service subject to not causing harmful interference to, and not receiving protection from any interference due to the operation of, industrial, scientific and medical devices, automatic vehicle monitoring systems or Government stations authorized in this band.

(b) Amateur stations shall not operate in those portions of the States of Texas and New Mexico bounded on the south by latitude $31^0$ N, on the east by longitude $104^0$ 11' W, on the north by latitude $34^0$ 30' N and on the west by longitude $107^0$ 30' W.

(9) Amateur stations in the 23 cm band, the 3 cm band, the 24.05- 24.25 GHz segment of the 1.2 cm band, the 76-81 GHz segment of the 4 mm band, the 144-149 GHz segment of the 2 mm band and the 241-248 GHz segment of the 1 mm band must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(10) In the 1240-1260 MHz segment of the 23 cm band, amateur stations must not cause cause harmful interference to, and are not protected from interference due to the operation of, stations in the radionavigation- satellite service.

(11) In the 13 cm band:

(a) The amateur service is allocated on a secondary basis in all ITU Regions. In ITU Region 1, stations in the amateur service must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed service. In ITU Regions 2 and 3, stations in the amateur service must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed, mobile and radiolocation services.

(b) In the United States, the 2300-2310 MHz segment is allocated to the amateur service on a co-secondary basis with the Government fixed and mobile services. In this segment, the fixed and mobile services must not cause harmful interference to the amateur service. Amateur stations in the 2400-2450 MHz segment of the 13 cm band are not protected from interference due to the operation of industrial, scientific and medical devices on 2450 MHz.

(12) Amateur stations in the 3.332-3.339 GHz and 3.3458-3525 GHz segments of the 9 cm band, the 2.5 mm band, 144.68-144.98 GHz, 145.45-145.75 and 146.82-147.12 GHz segments of the 2 mm band and the 343- 348 GHz segment must not cause harmful interference to stations in the radio astronomy service. Amateur stations in the 300-302 GHz, 324-326 GHz, 345- 347 GHz, 363-365 GHz and 379-381 GHz segments must not cause harmful interference to stations in the space research service (passive) or Earth exploration-satellite service (passive).

(13) In the 9 cm band:

(a) In ITU Regions 2 and 3, the band is allocated to the amateur service on a secondary basis.

(b) In the United States, the band is allocated to the amateur service on a co-secondary basis with the non-government radiolocation service.

(c) In the 3.3-3.4 GHz segment, amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(d) In the 3.4-3.5 GHz segment, amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed and fixed-satellite service.

(14) In the 5 cm band:

(a) In the 5.650-5.725 GHz segment, the amateur service is allocated in all ITU Regions on a co-secondary basis with the space research (deep space) service.

(b) In the 5.725-5.850 GHz segment, the amateur service is allocated in all ITU Regions on a secondary basis. Amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed-satellite service in ITU Region 1.

(c) Amateur stations in the 5.725-5.875 GHz segment are not protected from interference due to the operation of industrial, scientific and medical devices operating on 5.8 GHz.

(d) In the 5.650-5.850 GHz segment, amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the radiolocation service.

(e) In the 5.850-5.925 GHz segment, the amateur service is allocated in ITU Region 2 on a co-secondary basis with the radiolocation service. In the United States, the segment is allocated to the amateur service on a secondary basis to the non-government fixed-satellite service. Amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed, fixed-satellite and mobile services. Amateur stations must not cause harmful interference to, and are not protected from interference due to the operation of, stations in the non-government fixed-satellite service.

(15) In the 3 cm band:

(a) In the United States, the 3 cm band is allocated to the amateur service on a co-secondary basis with the non-government radio location service.

(b) In the 10.00-10.45 segment in ITU Regions 1 and 3, amateur stations must not cause interference to, and are not protected from interference due to the operation of, stations authorized by other nations in the fixed and mobile services.

(16) Amateur stations in the 1.2 cm band are not protected from interference due to the operation of industrial, scientific and medical devices on 24.125 GHz. In the United States, the 24.05-24.25 GHz segment is allocated to the amateur service on a co-secondary basis with the non-government radiolocation and Government and non-government Earth exploration-satellite (active) services.

(17) The 2.5 mm band is allocated to the amateur service on a secondary basis. Amateur stations in this band must not cause harmful interference to, and is not protected from interference due to the operation of, stations in the fixed, inter-satellite and mobile services.

(18) Amateur stations in the 244-246 GHz segment of the 1 mm band are not protected from interference due to the operation of industrial, scientific and medical devices on 245 GHz.

## APPENDIX B

### CROSS REFERENCE: CURRENT PART 97 TO PROPOSED PART 97

| Current Rules | Proposed Rules |
|---|---|
| 97.1 | 97.1 |
| 97.3(a) | 97.3(a) |
| 97.3(b) | 97.3(a); 97.213(a), intro. text; Appendix 3 |
| 97.3(c) | 97.7, intro. text |
| 97.3(d) | 97.5(c)(1) |
| 97.3(e) | 97.5(a) |
| 97.3(f) | 97.5(c)(1) |
| 97.3(g) | 97.5(c)(3) |
| 97.3(h) | 97.5(c)(2) |
| 97.3(i) | ----- |
| 97.3(j) | 97.5(a) |
| 97.3(k) | 97.303(e); Appendix 3 |
| 97.3(l) | 97.213(b)(3) and (4); 97.301(d); Appendix 3 |
| 97.3(m)(1) | 97.211(a); Appendix 3 |
| 97.3(m)(2) | 97.211(b); Appendix 3 |
| 97.3(m)(3) | 97.211(c); Appendix 3 |
| 97.3(n) | 97.213(b)(3); Appendix 3 |
| 97.3(o) | 97.7 |
| 97.3(p) | 97.209; Appendix 3 |
| 97.3(q) | 97.15, intro. text |
| 97.3(r) | 97.203(a); Appendix 3 |
| 97.3(s) | ----- |
| 97.3(t) | 97.403(a); Appendix 3 |
| 97.3(u) | 97.301(b); Appendix 3 |
| 97.3(v) | 97.215(a); Appendix 3 |
| 97.3(w) | 97.219(a); Appendix 3 |
| 97.3(x) | 97.301(d) |
| 97.3(y) | 97.401(d); Appendix 3 |
| 97.3(z) | 97.409(b) |
| 97.3(aa) | 97.301(d); Appendix 3 |
| 97.3(bb) | 97.219(c); Appendix 3 |
| 97.3(cc) | 97.131(a)(6); Appendix 3 |
| 97.3(dd) | 97.301(d); 97.305(d) |
| 97.5 | 97.9(a) |
| 97.7 | 97.151; 97.203(a); Appendix 4 |
| 97.9 | 97.5(c)(1)-(6); 97.17(a) |
| 97.11(a) | 97.17 |
| 97.11(b) | 97.19 |
| 97.13 | 97.19 |
| 97.19 | 97.9(a) and 97.171 |
| 97.21(a) | 97.173(a) |
| 97.21(b) | 97.173(a) |
| 97.21(c) | 97.173(b) |
| 97.21(d) | 97.173(c) |
| 97.23 | 97.175 |
| 97.25(a) | 97.505(a)(1) |
| 97.25(b) | 97.505(a)(2) and (3) |
| 97.25(c) | 97.505(a)(4) |
| 97.25(d) | 97.505(b) |
| 97.25(e) | ----- |
| 97.26(a) | 97.501(a) and 97.507(d) |
| 97.26(b) | 97.501(a) |
| 97.26(c) | 97.501(a) |
| 97.26(d) | 97.17(c) |
| 97.26(e) | 97.501(a) and (b) |
| 97.26(f) | ---- |
| 97.26(g) | 97.501(g) |
| 97.27(a) | 97.503(d) |
| 97.27(b) | 97.503(c) |
| 97.27(c) | 97.501(c) |
| 97.27(d) | 97.501(c) |
| 97.28(a) | 97.503(a); 97.507(b) and (c) |
| 97.28(b) | 97.503(a) and 97.509(a) |
| 97.28(c) | 97.501(d) |
| 97.28(d) | 97.501(f) |
| 97.28(e) | 97.505(a)(2) and 97.507(e) |
| 97.28(f) | 97.501(e) |
| 97.28(g) | 97.509(b) |
| 97.28(h) | 97.507(f) |
| 97.28(i)(1) | 97.501(h)(1) |
| 97.28(i)(2) | 97.501(h)(2) |
| 97.28(j) | 97.501(h)(3) |
| 97.29(a) | 97.501(d) |
| 97.29(b) | 97.173(b) |
| 97.29(c) | 97.173(a) and 97.503(e) |
| 97.31(a)(i) | 97.511(a) |
| 97.31(a)(ii) | 97.511(d) |
| 97.31(b) | 97.511(b) |
| 97.31(c) | 97.541(a) and (c) |
| 97.31(d) | 97.507(a) |
| 97.31(e) | 97.511(c) |
| 97.33 | 97.513 |
| 97.35 | 97.9(c) |
| 97.36 | 97.541 |
| 97.37 | 97.5(c)(1), (2) & (3) |
| 97.39 | ---- |
| 97.40(a) | 97.5(a), (b) and (c)(6) |
| 97.40(b) | 97.5(c)(1) |
| 97.41(a) | 97.5(c)(6) |
| 97.41(b) | 97.153(a) |
| 97.41(c) | 97.153(c) |
| 97.42(a) | 97.17(b) |
| 97.42(b) | 97.17(b) |
| 97.42(c) | 97.13(a) |
| 97.42(d) | 97.13(b) |
| 97.43 | 97.21 |
| 97.44 | 97.21 |
| 97.45 | 97.15 |
| 97.47 | 97.19 |
| 97.49 | 97.25 |
| 97.51 | 97.17(f) |
| 97.57 | 97.27 |
| 97.59 | 97.23(a) |
| 97.61 | 97.131 |
| 97.63 | 97.203(b) |
| 97.65(a) | 97.131(a)(1) and (c) |
| 97.65(b) | ---- |
| 97.65(c) | 97.131(e)(2) |
| 97.65(d) | 97.131(e)(2) |
| 97.65(e) | 97.131(e)(7) |
| 97.65(f) | 97.131(e)(13) |
| 97.67(a) | 97.403(a) |
| 97.67(b) | 97.403(b) |
| 97.67(c) | Reserved under current rules. |
| 97.67(d) | 97.403(c) |
| 97.67(e) | 97.303(c) |
| 97.67(f) | 97.403(b) |
| 97.67(g) | 97.101(d) |
| 97.67(h) | 97.403(f) |
| 97.67(i) | 97.403(g) |
| 97.67(j) | 97.403(d) |
| 97.67(k) | 97.403(e) |
| 97.69, intro. text | 97.405(b) |
| 97.69(a)(1)(i) | 97.131(e)(3) |
| 97.69(a)(1)(ii) | 97.131(e)(4) |
| 97.69(a)(1)(iii) | 97.131(e)(5) |
| 97.69(a)(1)(iv) | 97.131(e)(6) |
| 97.69(a)(2) | 97.131(e)(3) & (6) |
| 97.69(b) | 97.131(a)(3) |
| 97.69(c), intro. text | 97.131(e)(7), (8) & (9) |
| 97.69(c)(1) | 97.131(e)(7), (8) & (9) |
| 97.69(c)(2), intro. text | 97.131(e)(7), (8) & (9) |
| 97.69(c)(2)(i) | 97.131(e)(7) |
| 97.69(c)(2)(ii) | 97.131(e)(8) |
| 97.69(c)(2)(iii) | 97.131(e)(9) |
| 97.69(c)(3) | Reserved under current rules. |
| 97.69(c)(4) | 97.405(c) |
| 97.69(d) | 97.405(a) |

| | | | |
|---|---|---|---|
| 97.71(a) | 97.407(a) | 97.101 | 97.11 |
| 97.71(b) | 97.131(d) | 97.107 | 97.101(c) |
| 97.71(c) | 97.407(b) | 97.110 | 97.219(c) |
| 97.71(d) | 97.407(a) | 97.111 | 97.191 |
| 97.71(e) | 97.407(c) | 97.112 | 97.219(b) |
| 97.71(f) | 97.407(d) | 97.113(a) | 97.219(d) |
| 97.71(g) | 97.407(e) | 97.113(b) | 97.219(d) |
| 97.71(h) | 97.407(f) | 97.113(c) | 97.219(e) |
| 97.71(i) | 97.407(g) | 97.113(d) | 97.213(b) |
| 97.73(a) | 97.401(d) | 97.114 | 97.215 |
| 97.73(b) | 97.401(e) | 97.115 | 97.219(g) |
| 97.73(c) | 97.401(c) | 97.116 | 97.219(g) |
| 97.73(d) | 97.401(c) | 97.117 | 97.219(g) |
| 97.73(NOTE) | 97.401(a) and (b) | 97.119 | 97.219(g) |
| 97.75(a) | 97.409(b) | 97.121(a) | 97.219(g) |
| 97.75(b) | 97.409(c) | 97.121(b) | 97.217(a) |
| 97.75(NOTE) | 97.409(a) | 97.123 | 97.217(a) |
| 97.76(a) | 97.409(b) | 97.125 | 97.219(h) |
| 97.76(b) | 97.409(a) | 97.126(a) | 97.219(e) |
| 97.76(c) | 97.409(c) | 97.126(b) | ----- |
| 97.77 | 97.411 | 97.127 | ----- |
| 97.78 | 97.201 | 97.129 | 97.17(e) |
| 97.79(a) | 97.205(a) | 97.131 | 97.221 |
| 97.79(b) | 97.7, 97.205 and 97.207 | 97.133 | 97.221 |
| 97.80(a) | 97.211(c) | 97.135 | 97.221 |
| 97.80(b) | 97.211(d) | 97.137 | ---- |
| 97.80(c) | 97.211(c) | 97.161 | 97.3(c) |
| 97.81(a) | 97.5(b) | 97.163(a) | 97.3(c) |
| 97.81(b) | 97.205(c) | 97.163(b) | 97.5(c)(4) |
| 97.82 | 97.9(b) and 97.205(c) | 97.165 | ---- |
| 97.83 | 97.5(b) and 97.205(c) | 97.169 | 97.317(a) |
| 97.84(a) | 97.217(a) | 97.171 | 97.5(c)(4) |
| 97.84(b) | 97.217(a) and (d) | 97.173 | 97.5(c)(4) |
| 97.84(c) | 97.217(a) | 97.175 | 97.317(a) |
| 97.84(d)(1) | 97.305(a) | 97.177 | 97.317(a) |
| 97.84(d)(2) | 97.301(a) | 97.179 | 97.317(b) |
| 97.84(d)(3) | 97.303(a) | 97.181 | 97.5(d) and 97.9(b) |
| 97.84(e) | ----- | 97.185 | 97.317(b) |
| 97.84(f) | 97.217(e) | 97.189(a) | 97.317(c) |
| 97.84(g) | 97.217(b) | 97.189(b) | 97.317(d) |
| 97.84(h) | 97.215(c) | 97.191 | 97.317(e) |
| 97.85(a) | 97.305(f) and (g) | 97.193(a) | 97.317(f) |
| 97.85(b) | 97.207 | 97.193(b) | 97.317(g) |
| 97.85(c) | 97.305(c) | 97.301 | ---- |
| 97.85(d) | 97.219(d) | 97.303 | 97.5(c)(5) |
| 97.85(e) | 97.211(c) and 97.305(e) | 97.305 | 97.5(c)(5) and 97.17(d) |
| 97.85(f) | 97.305(i) | 97.307(a) | 97.5(c)(5) |
| 97.85(g) | 97.301(d) and 305(d) | 97.307(b) | ---- |
| 97.85(h) | 97.305(b) | 97.307(c) | 97.23(b) |
| 97.85(i) | 97.305(j) | 97.309 | 97.153(c) |
| 97.86(a) | 97.301(e) | 97.311 | 97.153(b) |
| 97.86(b) | ---- | 97.313 | 97.217(f) |
| 97.86(c) | 97.301(b) | 97.401 | 97.3(b) |
| 97.86(d) | 97.301(c) | 97.403(a) | 97.307(f) |
| 97.86(e) | 97.301(f) | 97.403(b) | 97.313(a), intro. text |
| 97.87(a) | 97.303(b) | 97.403(c) | 97.213(b)(7) |
| 97.87(b) | 97.303(d) | 97.403(d) | 97.213(b)(8) |
| 97.87(c) | 97.303(f) | 97.405 | ---- |
| 97.87(d) | 97.303(e) | 97.407 | 97.311(e) |
| 97.87(e) | 97.303(d) | 97.409 | 97.313(c) |
| 97.87(f) | 97.303(g) | 97.411 | 97.315(d) |
| 97.88(a) | 97.307(d) | 97.413 | 97.311(a) |
| 97.88(b) | 97.307(d) | 97.415 | 97.311(b), 97.313(a) and 97.315(b) |
| 97.88(c) | 97.307(a) | | |
| 97.88(d) | 97.307(b) | 97.417(a) | 97.217(a) |
| 97.88(e) | 97.305(h) | 97.417(b) | 97.311(c) |
| 97.88(f) | 97.307(e) | 97.417(c) | 97.207(c) and 97.307(f) |
| 97.88(g) | 97.307(c) | 97.419(a) | 97.311(d) |
| 97.89 | 97.213 | 97.419(b) | 97.213(b)(8) |
| 97.90 | 97.301(b) | 97.421(a) | 97.315(a) |
| 97.92 | 97.205(c) | 97.421(b) | 97.217(a) |
| 97.93 | 97.213(b)(1) | 97.421(c) | 97.315(c) |
| 97.95 | 97.5(b) and (d) | 97.422 | 97.313(b) |
| 97.99 | 97.309 | 97.423(a) | ----- |

| | |
|---|---|
| 97.423(b) | 97.311(f) |
| 97.423(c) | 97.311(g) |
| 97.423(d) | 97.311(h) |
| 97.501 | ---- |
| 97.503(a) | ---- |
| 97.503(b) | ---- |
| 97.505 | ---- |
| 97.507(a) | 97.523(a) |
| 97.507(b) and (c) | 97.523(b) and Appendix 2 |
| 97.507(d) | 97.523(c) |
| 97.507(e) | 97.541 |
| 97.507(f) | 97.523(d) |
| 97.509 | 97.523(e) |
| 97.511 | 97.521 |
| 97.513 | 97.525(a) |
| 97.515 | 97.529 |
| 97.517 | 97.503(a) |
| 97.519, intro. text | 97.507(f) |
| 97.519 (a), (b) and (c) | 97.525(b) |
| 97.519(d) | 97.525(c) |
| 97.521 | 97.503(b) and 97.527 |
| 97.523 | Reserved under current rules. |
| Appendix 1 | Reserved under current rules. |
| Appendix 2 | 97.3(a) and (b); 97.151; 97.173(a) and (b); 97.191; 97.215; 97.217; 97.311(a); 97.401; and 97.403. |
| Appendix 3 | 97.131 |
| Appendix 4 | 97.5(c)(6) and 97.153(a) |
| Appendix 5 | Reserved under current rules. |
| Appendix 6 | 97.101 |
| Appendix 7 | 97.151 |
| Appendix 8 | 97.311 and 97.313 |

## APPENDIX C

### CROSS REFERENCE: PROPOSED PART 97 TO CURRENT PART 97

| Proposed Rules | Current Rules |
|---|---|
| 97.1 | 97.1 |
| 97.3(a) | 97.3(a) and (b); Appendix 2 |
| 97.3(b) | 97.401 and Appendix 2 |
| 97.3(c) | 97.161 and 97.163(a) |
| 97.5(a) | 97.3(e), 97.3(j) and 97.40(a) |
| 97.5(b) | 97.40(a), 97.81(a), 97.83 and 97.95 |
| 97.5(c)(1) | 97.3(d) and (f); 97.9; 97.37(a); and 97.40(b) |
| 97.5(c)(2) | 97.3(h), 97.9 and 97.37(b) |
| 97.5(c)(3) | 97.3(g), 97.9 and 97.37(a) and (b) |
| 97.5(c)(4) | 97.9, 97.163(b), 97.171 and 97.173 |
| 97.5(c)(5) | 97.9, 97.303, 97.305 and 97.307(a) |
| 97.5(c)(6) | 97.9, 97.40(a), 97.41(a) and Appendix 4 |
| 97.5(d) | 97.95 and 97.181 |
| 97.7 | 97.3(c) and (o); 97.79(b) |
| 97.9(a) | 97.5 and 97.19 |
| 97.9(b) | 97.82 and 97.181 |
| 97.9(c) | 97.35 |
| 97.11 | 97.101 |
| 97.13(a) | 97.42(c) |
| 97.13(b) | 97.42(d) |
| 97.15 | 97.3(q) and 97.45 |
| 97.17, generally | 97.11(a) |
| 97.17(a) | 97.9 |
| 97.17(b) | 97.42(a) and (b) |
| 97.17(c) | 97.26(d) |
| 97.17(d) | 97.305 |
| 97.17(e) | 97.129 |
| 97.17(f) | 97.51 |
| 97.19 | 97.11(b), 97.13 and 97.47 |
| 97.21 | 97.43 and 97.44 |
| 97.23(a) | 97.59(a) and (b) |
| 97.23(b) | 97.307(c) |
| 97.25 | 97.49 |
| 97.27 | 97.57 |
| 97.101 | 97.67(g), 97.107 and Appendix 6 |
| 97.103 | ----- |
| 97.105 | ----- |
| 97.107 | ----- |
| 97.131,generally | 97.61 and Appendix 3 |
| 97.131(a) | 97.3(cc), 97.65(a) and 97.69(b) |
| 97.131(b) | ----- |
| 97.131(c) | 97.65(a) |
| 97.131(d) | 97.71(b) |
| 97.131(e)(1) | ----- |
| 97.131(e)(2) | 97.65(c) and (d) |
| 97.131(e)(3) | 97.69(a)(1)(i) and 97.69(a)(2) |
| 97.131(e)(4) | 97.69(a)(1)(ii) |
| 97.131(e)(5) | 97.69(a)(1)(iii) |
| 97.131(e)(6) | 97.69(a)(1)(iv) and 97.69(a)(2) |
| 97.131(e)(7) | 97.65(e); 97.69(c), intro. text; 97.69(c)(1) 97.69(c)(2), intro text; and 97.69(c)(2)(i) |
| 97.131(e)(8) | 97.69(c), intro. text; 97.69(c)(1) and 97.69(c)(2), intro. text; and 97.69(c)(2)(ii) |
| 97.131(e)(9) | 97.69(c), intro. text; 97.69(c)(1) and 97.69(c)(2), intro. text; and 97.69(c)(2)(iii) |
| 97.131(e)(10) | ----- |
| 97.131(e)(11) | ----- |
| 97.131(e)(12) | ----- |
| 97.131(e)(13) | 97.65(f) |
| 97.131(e)(14) | ----- |
| 97.151 | 97.7 and Appendices 2 and 7 |
| 97.153(a) | 97.41(b) and Appendix 4 |
| 97.153(b) | 97.311 |
| 97.153(c) | 97.41(c) and 97.309 |
| 97.171 | 97.19 |
| 97.173(a) | 97.21(a) and (b); 97.29(c); Appendix 2 |
| 97.173(b) | 97.21(c), 97.29(b) and Appendix 2 |
| 97.173(c) | 97.21(d) |
| 97.175 | 97.23 |
| 97.191 | 97.111 and Appendix 2 |
| 97.201 | 97.78 |
| 97.203(a) | 97.3(r) and 97.7 |
| 97.203(b) | 97.63 |
| 97.205(a) | 97.79(a) and (b) |
| 97.205(b) | 97.79(b) |
| 97.205(c) | 97.81(b), 97.82, 97.83 and 97.92 |
| 97.207 | 97.79(b), 97.85(b) and 97.417(c) |
| 97.209 | 97.3(p) |
| 97.211(a) | 97.3(m)(1) |
| 97.211(b) | 97.3(m)(2) |
| 97.211(c) | 97.3(m)(3); 97.80(a) and (c); 97.85(e) |
| 97.211(d) | 97.80(b) |
| 97.213(a) | 97.89(a) |
| 97.213(b), generally | 97.113(d) |
| 97.213(b)(1) | 97.93 |
| 97.213(b)(2) | ----- |
| 97.213(b)(3) | 97.3(l) and (n) |
| 97.213(b)(4) | 97.3(l), 97.89(b) and 97.113(d)(1) |
| 97.213(b)(5) | 97.89(b) and 97.113(d)(1) |

| | |
|---|---|
| 97.213(b)(6) | 97.113(d)(4) |
| 97.213(b)(7) | 97.403(c) |
| 97.213(b)(8) | 97.403(d) and 97.419(b) |
| 97.213(b)(9) | 97.113(d)(2) |
| 97.213(b)(10) | 97.113(d)(3) |
| 97.215 | 97.3(v), 97.84(h), 97.114 and Appendix 2 |
| 97.217, generally | Appendix 2 |
| 97.217(a) | 97.84(a), (b) and (c); 97.121(b); 97.123; 97.417(a); 97.421(b) |
| 97.217(b) | 97.84(g) |
| 97.217(c) | ----- |
| 97.217(d) | 97.84(b) |
| 97.217(e) | 97.84(f) |
| 97.217(f) | 97.313 |
| 97.219(a) | 97.3(w) |
| 97.219(b) | 97.112 |
| 97.219(c) | 97.3(bb) and 97.110 |
| 97.219(d) | 97.85(d); 97.113(a) and (b) |
| 97.219(e) | 97.113(c) and 97.126(a) |
| 97.219(f) | ----- |
| 97.219(g) | 97.115, 97.116, 97.117, 97.119 and 97.121(a) |
| 97.219(h) | 97.125 |
| 97.221 | 97.131, 97.133 and 97.135 |
| 97.301(a) | 97.84(d)(2) |
| 97.301(b) | 97.3(u), 97.86(c) and 97.90 |
| 97.301(c) | 97.86(d) |
| 97.301(d) | 97.3(l), (x), (aa) and (dd); 97.85(g) |
| 97.301(e) | 97.86(a) |
| 97.301(f) | 97.86(e) |
| 97.303(a) | 97.84(d)(3) |
| 97.303(b) | 97.87(a) |
| 97.303(c) | 97.67(e) |
| 97.303(d) | 97.87(b) and (e) |
| 97.303(e) | 97.3(k) and 97.87(d) |
| 97.303(f) | 97.87(c) |
| 97.303(g) | 97.87(f) |
| 97.305(a) | 97.84(d)(1) |
| 97.305(b) | 97.85(h) |
| 97.305(c) | 97.85(c) |
| 97.305(d) | 97.3(dd) and 97.85(g) |
| 97.305(e) | 97.85(e) |
| 97.305(f) | 97.85(a) |
| 97.305(g) | 97.85(a) |
| 97.305(h) | 97.88(e) |
| 97.305(i) | 97.85(f) |
| 97.305(j) | 97.85(i) |
| 97.307(a) | 97.88(c) |
| 97.307(b) | 97.88(d) |
| 97.307(c) | 97.88(g) |
| 97.307(d) | 97.88(a) and (b) |
| 97.307(e) | 97.88(f) |
| 97.307(f) | 97.403(a) and 97.417(c) |
| 97.309 | 97.99 |
| 97.311, generally | Appendix 8 |
| 97.311(a) | 97.413 and Appendix 2 |
| 97.311(b) | 97.415 |
| 97.311(c) | 97.417(b) |
| 97.311(d) | 97.419(a) |
| 97.311(e) | 97.407 |
| 97.311(f) | 97.423(b) |
| 97.311(g) | 97.423(c) |
| 97.311(h) | 97.423(d) |
| 97.313, generally | Appendix 8 |
| 97.313(a), intro. text | 97.403(b) |
| 97.313(a) | 97.415 |
| 97.313(b) | 97.422 |
| 97.313(c) | 97.409 |
| 97.315(a) | 97.421(a) |
| 97.315(b) | 97.415 |
| 97.315(c) | 97.421(c) |
| 97.315(d) | 97.411 |
| 97.317(a) | 97.169, 97.175 and 97.177 |
| 97.317(b) | 97.179 and 97.185 |
| 97.317(c) | 97.189(a) |
| 97.317(d) | 97.189(b) |
| 97.317(e) | 97.191 |
| 97.317(f) | 97.193(a) |
| 97.317(g) | 97.193(b) |
| 97.401, generally | Appendix 2 |
| 97.401(a) | 97.73(NOTE) |
| 97.401(b) | 97.73(NOTE) |
| 97.401(c) | 97.73(c) and (d) |
| 97.401(d) | 97.3(y) and 97.73(a) |
| 97.401(e) | 97.73(b) |
| 97.403, generally | Appendix 2 |
| 97.403(a) | 97.3(t) and 97.67(a) |
| 97.403(b) | 97.67(b) and (f) |
| 97.403(c) | 97.67(d) |
| 97.403(d) | 97.67(j) |
| 97.403(e) | 97.67(k) |
| 97.403(f) | 97.67(h) |
| 97.403(g) | 97.67(i) |
| 97.405(a) | 97.69(d) |
| 97.405(b) | 97.69, intro. text |
| 97.405(c) | 97.69(c)(4) |
| 97.407(a) | 97.71(a) and (d) |
| 97.407(b) | 97.71(c) |
| 97.407(c) | 97.71(e) |
| 97.407(d) | 97.71(f) |
| 97.407(e) | 97.71(g) |
| 97.407(f) | 97.71(h) |
| 97.407(g) | 97.71(i) |
| 97.409(a) | 97.75(NOTE) and 97.76(b) |
| 97.409(b) | 97.3(z), 97.75(a) and 97.76(a) |
| 97.409(c) | 97.75(b) and 97.76(c) |
| 97.411 | 97.77 |
| 97.501(a) | 97.26(a), (b), (c) and (e) |
| 97.501(b) | 97.26(e) |
| 97.501(c) | 97.27(c) and (d) |
| 97.501(d) | 97.28(c) and 97.29(a) |
| 97.501(e) | 97.28(f) |
| 97.501(f) | 97.28(d) |
| 97.501(g) | 97.26(g) |
| 97.501(h)(1) | 97.28(i)(1) |
| 97.501(h)(2) | 97.28(i)(2) |
| 97.501(h)(3) | 97.28(j) |
| 97.503(a) | 97.28(a) and (b); 97.517 |
| 97.503(b) | 97.521 |
| 97.503(c) | 97.27(b) |
| 97.503(d) | 97.27(a) |
| 97.503(e) | 97.29(c) |
| 97.505(a)(1) | 97.25(a) |
| 97.505(a)(2) | 97.25(b) and 97.28(e) |
| 97.505(a)(3) | 97.25(b) |
| 97.505(a)(4) | 97.25(c) |
| 97.505(b) | 97.25(d) |
| 97.507(a) | 97.31(d) |
| 97.507(b) | 97.28(a) |
| 97.507(c) | 97.28(a) |
| 97.507(d) | 97.26(a) |
| 97.507(e) | 97.28(e) |
| 97.507(f) | 97.28(h) and 97.519, intro. text |
| 97.509(a) | 97.28(b) |
| 97.509(b) | 97.28(g) |
| 97.511(a) | 97.31(a)(i) |
| 97.511(b) | 97.31(b) |
| 97.511(c) | 97.31(e) |
| 97.511(d) | 97.31(a)(ii) |
| 97.513 | 97.33 |
| 97.521 | 97.511 |
| 97.523(a) | 97.507(a) |
| 97.523(b) | 97.507(b) and (c) |
| 97.523(c) | 97.507(d) |
| 97.523(d) | 97.507(f) |

| | |
|---|---|
| 97.523(e) | 97.509 |
| 97.525(a) | 97.513 |
| 97.525(b) | 97.519(a), (b) and (c) |
| 97.525(c) | 97.519(d) |
| 97.527 | 97.521 |
| 97.529 | 97.515 |
| 97.541 | 97.31(c), 97.36 and 97.507(e) |
| Appendix 1 | ----- |
| Appendix 2 | 97.507(b) and (c) |
| Appendix 3 | 97.3 |
| Appendix 4 | 97.7 |

## FOOTNOTES

[1] The services consist of the amateur service, the amateur-satellite service and the radio amateur civil emergency service (RACES). Of the three, the amateur service and the amateur-satellite service are recognized internationally. RACES exists only in the United States.

[2] *See Report and Order*, Docket 9295, 42 FCC 198 (1951).

[3] Understanding of our rules is a requirement for an amateur operator license. A significant percentage of the questions that must be answered in each written examination is based upon our rules.

[4] For example, amateur operators in the United States and Canada operate a system of some 12,000 repeater stations.

[5] Public Law No. 97-259, 96 Stat. 1087 (codified in pertinent part at 47 U.S.C. § 154(f)(4) (1982)).

[6] *See* No. 53 of the *ITU Radio Regulations* (Geneva, 1979). *See also* 47 U.S.C. § 153(q).

[7] The basis and purpose of RACES is to provide for civil defense communications by amateur stations, particularly during an emergency that necessitates invoking of the President's War Emergency Powers under Section 706 of the Communications Act of 1934, as amended, 47 U.S.C. § 606.

[8] *See* Resolution No. 640, ITU *Radio Regulations* (Geneva, 1979).

[9] *See* No. 347 of the ITU *Radio Regulations* (Geneva, 1979).

[10] *See Third Report and Order*, General Docket No. 80-739, 49 Fed. Reg. 48694 (1984).

[11] P. Rinaldo, *A Working Paper on Designation of Emissions in the Amateur Service*, (1987).

[12] The descriptions following each term in this text are for informational purposes only and are not complete. For a complete definition of each proposed emission descriptor see the proposed rules.

[13] *Comments of the Capitol Hill Amateur Radio* Society, in response to the Notice of Proposed Rule Making in PR Docket No. 83-28, 48 Fed. Reg. 4855 (1983).

[14] Comments of the Emerson Electric Amateur Radio Club, in response to the Notice of Proposed Rule Making in PR Docket No. 83-28, 48 Fed. Reg. 4855 (1983).

[15] Comments of the American Radio Relay League, Inc., in response to the Notice of Proposed Rule Making in PR Docket No. 83-28, 48 Fed. Reg. 4855 (1983).

[16] See No. 2732 of the *ITU Radio Regulations* (Geneva, 1979).

[17] Stanford Research Institute, Amateur Radio: An International Resource for Technological, Economic, and Sociological Development (1966), at 61.

[18] See *Memorandum Opinion and Order*, PR Docket No. 85-105, 1 FCC Rcd 166 (1986).

[19] See Order, Mimeo Number 6366 (1983).

[20] See Order, FCC 83-298, adopted June 29, 1983.

[21] See *Report and Order*, BC Docket No. 79-47, 101 FCC 2d 32 (1985) at paragraph 22, aff'd Memorandum Opinion and Order, 103 FCC 2d 917 (1986), at paragraph 8.

[22] Baudot (also called Murray or International Telegraphy Alphabet No. 2) is the five-character binary code widely used for RTTY transmissions. ASCII is seven-character binary code also used for RTTY transmissions. AMTOR is an error correcting digital teleprinter code.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN. Docket No. 87-112**

In the Matter of

Development and Implementation of
a Public Safety National Plan and
Amendment of Part 90 to Establish
Service Rules and Technical Standards
for Use of the 821-824/866-869 MHz
Bands by the Public Safety Services.

## MEMORANDUM OPINION AND ORDER

**Adopted: March 30, 1988; Released: April 11, 1988**

By the Commission:

## I. INTRODUCTION

1. On December 18, 1987, the Commission released a *Report and Order* [1] in the above-captioned proceeding adopting policies, service rules, and technical standards to govern usage of the 821-824/866-869 MHz public safety spectrum. J. Y. Nasser, past chairman of the National Public Safety Planning Advisory Committee (NPSPAC),[2] has requested reconsideration of that *Order* to realign the public safety regions to conform more closely with the regional boundaries intended by NPSPAC in its *Final Report* [3] to the Commission.[4]

## II. BACKGROUND

2. The *Report and Order* set forth a plan to ensure that present and future spectrum requirements of the public safety community will be met. The plan provides direction on broad spectrum allocation issues at the national level and focuses on the great diversity of needs that exist at the state and local levels. It offers technical and procedural guidance on the use of the new spectrum by the public safety services and also creates a framework for development of regional plans. As discussed in the *Report and Order*, regional planning will be accomplished through the preparation of written plans by Regional Planning Committees (RPCs) composed of representatives of the state and local public safety and special emergency community.

3. The Commission, in its *Notice of Proposed Rule Making* [5] in this proceeding, asked that NPSPAC recommend boundaries for the public safety planning regions. In their *Final Report*, the Committee proposed the establishment of 54 regions. The Committee did not, however, delineate specific boundaries for proposed regions that included parts of one or more states. In order to define regional boundaries unambiguously and to assure that all of the land area of the 50 states, Puerto Rico, and the Virgin Islands was included, the Commission defined precise boundaries for 48 regions in a manner that we believed closely aligned boundaries in accordance with the NPSPAC recommendations. *Report and Order* at para. 43.

4. While most of the regions established by the Commission were identical to those recommended by NPSPAC, several did not conform exactly to those recommendations. For example, for the State of Texas, the Commission created a single public safety region, while the Committee recommended separate regions centered in six of the state's largest metropolitan areas (Austin, Dallas-Ft. Worth, Houston, Lubbock, El Paso, and San Antonio). Similarly, in the Chicago area, the Committee recommended a four-state region that included parts of Indiana, Illinois, Michigan and Wisconsin, but the Commission chose not to create such an interstate region, stating that "the public safety requirements in border areas of these states [could] best be satisfied through cooperative efforts of the regional planning committees in these states." *Report and Order* at para. 43.

## III. PETITION FOR RECONSIDERATION

5. In its petition, NPSPAC requests that the Commission reconfigure the boundaries of several of the public safety planning regions to conform to those intended by NPSPAC in its *Final Report*. It states that the exact delineation of regions in terms of recognized political subdivisions (*e. g.*, counties) was not provided in the *Final Report*. As a result, NPSPAC states, the "Commission, while generally adopting the NPSPAC *Final Report* recommendations, made substantial changes in the configuration of some regions." Petition at 4.

6. NPSPAC is petitioning the Commission to create new Chicago and Buffalo area regions, six new Texas regions, and expanded Philadelphia and New York City area planning regions. *See* Appendix A. In support of its request, NPSPAC asserts that they developed these suggested boundaries based on "historical frequency of interference problems, existing interoperability requirements, existing disaster management support plans, and existing or projected population densities." Petition at 3. NPSPAC states that use of these criteria should promote "a cohesive planning effort within each area, with the added benefit of minimizing necessary inter-region coordination". Petition at 3. NPSPAC also indicates that any delay in resolving disparities in regional boundaries will have a "debilitating effect" on spectrum planning efforts in many areas of the country. NPSPAC, therefore, requests expedited consideration of this matter. Petition at 5. It notes that in certain parts of the country (*e. g.*, New York and Dallas-Fort Worth) planning groups have been in existence for years and have already begun the planning process.

7. We received comments from 22 individuals and organizations, *all* expressing support for the NPSPAC petition. (*See* Appendix B for the listing of commenters.) For example, the Port Authority of New York and New Jersey noted that "the Commission should expeditiously grant NPSPAC's petition so that the regional planning process can move forward." Port Authority comments at 3. The Associated Public Safety Communications Officers, Inc. (APCO) further stated that, "For all the reasons set forth in the [NPSPAC] petition, APCO totally supports the requested action." APCO comments at 2.

## IV. DECISION

8. We have examined the reconfigured regional boundaries as proposed in the petition, and concur with this alignment. The petition has given consideration to local and regional issues and characteristics in making its recommendations. Its use of this approach is in conformance with the regional planning concept outlined in the *Report and Order*, which emphasized that responsiveness to local needs and concerns is critical to the success of the program. *Report and Order* at para. 4. We find, further, that the granting of the petition will serve the public interest by enabling previously established planning groups to continue development of their regional plans. With the unanimous support of the 22 commenters, we, therefore, revise the public safety planning regions as requested and as shown in Appendix A.[6]

## V. CONCLUSION

9. IT IS ORDERED that the Petition for Reconsideration filed by the National Public Safety Planning Advisory Committee is GRANTED.

10. IT IS FURTHER ORDERED that effective immediately upon publication in the Federal Register,[7] the boundaries for the public safety planning regions will be as delineated in Appendix A of this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

## APPENDIX A

REVISED PUBLIC SAFETY REGIONS

1. Alabama
2. Alaska
3. Arizona
4. Arkansas
5. California - South (to the northernmost borders of San Luis Obispo, Kern, and San Bernardino Counties)
6. California - North (that part of California not included in California - South)
7. Colorado
8. New York - Metropolitan (Fairfield, Litchfield, New Haven, and Middlesex, Counties, Connecticut; Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, Dutchess, and Westchester Counties, New York; Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union, Warren, Middlesex, Somerset, Hunterdon, Mercer, and Monmouth Counties, New Jersey)
9. Florida
10. Georgia
11. Hawaii
12. Idaho
13. Illinois (all except area in Region 54)
14. Indiana (all except area in Region 54)
15. Iowa
16. Kansas
17. Kentucky
18. Louisiana
19. Maine New Hampshire Vermont Massachusetts Rhode Island Connecticut (except Fairfield, Litchfield, New Haven, and Middlesex Counties)
20. Maryland Washington, D.C. Virginia - Northern (Arlington, Fairfax, Fauquier, Loudoun, Prince William and Stafford Counties; and Alexandria, Fairfax, Falls Church, Manassas and Manassas Park Cities)
21. Michigan (all except area in Region 54)
22. Minnesota
23. Mississippi
24. Missouri
25. Montana
26. Nebraska
27. Nevada
28. New Jersey (except for counties included in the New York-Metropolitan, Region 8, above) Pennsylvania (Bucks, Chester, Montgomery, Philadelphia, Berks, Delaware, Lehigh, Northampton, Bradford, Carbon, Columbia, Dauphin, Lackawanna, Lancaster, Lebanon, Luzerne, Lycoming, Monroe, Montour, Northumberland, Pike, Schuylkill, Sullivan, Susquehanna, Tioga, Wayne, Wyoming and York Counties) Delaware
29. New Mexico
30. New York - Albany (all except area in New York - Metropolitan, Region 8, and New York - Buffalo, Region 55)
31. North Carolina
32. North Dakota
33. Ohio
34. Oklahoma
35. Oregon
36. Pennsylvania (all except area in Region 28, above)
37. South Carolina
38. South Dakota
39. Tennessee
40. Texas - Dallas (including the counties of Cooke, Grayson, Fannin, Lamar, Red River, Bowie, Wise, Denton, Collin, Hunt, Delta, Hopkins, Franklin, Titus, Morris, Cass, Tarrant, Dallas, Palo Pinto, Parker, Rockwall, Kaufman, Rains, VanZandt, Wood, Smith, Camp, Upshur, Gegg, Marion, Harrison, Panola, Rusk, Cherokee, Anderson, Henderson, Navarro, Ellis, Johnson, Hood, Somervell and Erath)
41. Utah
42. Virgina (all except area in Region 20, above)
43. Washington
44. West Virginia
45. Wisconsin (all except area in Region 54)
46. Wyoming
47. Puerto Rico
48. U.S. Virgin Islands

49. Texas - Austin (including the counties of Bosque, Hill, Hamilton, McLennan, Limestone, Freestone, Mills, Coryell, Falls, Robertson, Leon, San Saba, Lampasas, Bell, Milam, Brazos, Madison, Grimes, Llano, Burnet, Williamson, Burleson, Lee, Washington, Blanco, Hays, Travis, Caldwell, Bastrop, and Fayette)

50. Texas - El Paso (including the counties of Knox, Kent, Stonewall, Haskell, Throckmorton, Gaines, Dawson, Borden, Scurry, Fisher, Jones, Shackelford, Stephens, Andrews, Martin, Howard, Mitchell, Nolan, Taylor, Callahan, Eastland, Loving, Winkler, Ector, Midland, Glasscock, Sterling, Coke, Runnels, Coleman, Brown, Comanche, Culberson, Reeves, Ward, Crane, Upton, Reagan, Irion, Tom Green, Concho, McCulloch, Jeff Davis, Hudspeth, El Paso, Pecos, Crockett, Schleicher, Menard, Mason, Presidio, Brewster, Terrell, Sutton, and Kimble)

51. Texas - Houston (including the counties of Shelby, Nacogdoches, San Augustine, Sabine, Houston, Trinity, Angelina, Walker, San Jacinto, Polk, Tyler, Jasper, Newton, Montgomery, Liberty, Hardin, Orange, Waller, Harris, Chambers, Jefferson, Galveston, Brazoria, Fort Bend, Austin, Colorado, Wharton, and Matagorda)

52. Texas - Lubbock (including the counties of Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Grey, Wheeler, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Hardeman, Foard, Wilbarger, Witchita, Clay, Montague, Jack, Young, Archer, Baylor, King, Dickens, Crosby, Lubbock, Kockley, Cochran, Yoakum, Terry, Lynn, and Garza)

53. Texas - San Antonio (including the counties of Val Verde, Edwards, Kerr, Gillespie, Real, Bandera, Kendall, Kinney, Uvalde, Medina, Bexar, Comal, Guadalupe, Gonzales, Lavaca, Dewitt, Karnes, Wilson, Atascosa, Frio, Zavala, Maverick, Dimmit, LaSalle, McMullen, Live Oak, Bee, Goliad, Victoria, Jackson, Calhoun, Refugio, Aransas, San Patricio, Nueces, Jim Wells, Duval, Webb, Kleberg, Kenedy, Brooks, Jim Hogg, Zapata, Starr, Hidalgo, Willacy, and Cameron)

54. Chicago - Metropolitan (Winnebago, McHenry, Cook, Kane, Kendall, Grundy, Boone, Lake, DuPage, DeKalb, Will, and Kankakee Counties, Illinois; Kenosha, Milwaukee, Washington, Dodge, Walworth, Jefferson, Racine, Ozaukee, Waukesha, Dane, and Rock Counties, Wisconsin; Lake, La Porte, Jasper, Starke, St. Joseph, Porter, Newton, Pulaski, Marshall and Elkart Counties, Indiana; Ottawa, Kent, Van Buren, Kalamazoo, Barry, Muskegon, Allegan, Berrien, Cass, and St. Joseph Counties, Michigan)

55. New York - Buffalo (including the counties of Niagara, Chemung, Schuyler, Seneca, Erie, Chautauqua, Cattaraugus, Allegany, Wyoming, Genesee, Orleans, Monroe, Livingston, Steuben, Ontario, Wayne, and Yates)

## APPENDIX B

LIST OF COMMENTERS

Associated Public Safety Communications Officers, Inc.
The Port Authority of New York and New Jersey
Mike Borrego, Denver, Colorado
D. O. Brents, Decatur, Georgia
John R. DiSalvo, Tallahassee, Florida
Joseph J. Doyle, Rochester, New York
Donald G. Flahan, Berea, Ohio
Thomas E. Garrett, Montgomery, Alabama
Thomas E. Gibson, Plymouth Meeting, Pennsylvania
Joe A. Gourley, Nashville, Tennessee
Carl R. Guse, Iron Ridge, Wisconsin
H. P. Hillegas, Minneapolis, Minnesota
Michael D. Hogan, Lincoln, Nebraska
J. Peter Maehling, Pittsburgh, Pennsylvania
Art McDole, Salinas, California
Joseph McNeil, Hyannis, Massachusetts
Harry J. Miller, Richmond, Virginia
Ted L. Savely, Ames, Iowa
Jack Y. Sharp, Frankfort, Kentucky
William R. Vincent, Lafayette, Louisiana
Jack T. Watson, Oak Brook, Illinois
Carroll F. White, New York, New York

## FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1988).

[2] Mr. Nasser noted in the petition that the Commission's charter for NPSPAC officially expired December 31, 1987, but asked that the Commission treat the petition as a NPSPAC document, *nunc pro tunc*. For purposes of determining standing, we have decided to treat this petition as a filing from Mr. Nasser on behalf of interested individuals. For convenience, we refer to the petition throughout this document as the NPSPAC petition.

[3] Final Report of the National Public Safety Planning Advisory Committee to the Federal Communications Commission, Gen. Docket No. 87-112 (September 9, 1987) (*Final Report*).

[4] Petitions for reconsideration were also filed by General Electric Mobile Communications Business; Cellular Telecommunications Industry Association; International Municipal Signal Association and International Association of Fire Chiefs; and New Jersey Division of State Police. We will issue a separate Order dealing with the issues raised in these petitions.

[5] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987).

[6] In the petition, "Burleson" county was inadvertantly left off the list of counties in the Texas - Austin region. In Appendix A, we have included this county in its proper location.

[7] We find that good cause exists for dispensing with the Administrative Procedure Act's (APA) requirement that publication or service of a substantive rule must take place at least 30 days before its effective date, because the decision is designed to expedite the public safety planning process and causes no adverse impact to any groups or individuals. *See* 5 U.S.C. § 553(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-752

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Provision of Network Channel
Terminating Equipment for Group
and Supergroup Services

## ORDER SOLICITING FURTHER COMMENTS

**Adopted: March 31, 1988; Released: April 13, 1988**

By the Chief, Common Carrier Bureau:

## I. BACKGROUND

1. The present proceeding, to determine whether analog Network Channel Terminating Equipment (NCTE) should be detariffed, was one of several byproducts of this Commission's decision to require American Telephone and Telegraph Company (AT&T) to offer group and supergroup facilities[1] to other common carriers (OCCs) and the general public.[2] It also stems from a closely related proceeding which addressed the issue of detariffing digital NCTE. [3] In that proceeding, the Commission found that AT&T had failed to justify tariff restrictions prohibiting customer provision of channel service units (CSUs) and NCTE[4] used in connection with digital transmission services. The Commission also determined that this digital NCTE constituted customer premises equipment (CPE) under the *Computer II* decision.[5] That determination, in conjunction with the prescription of structural separation requirements for the Bell Operating Companies (BOCs),[6] necessitated the detariffing of new digital NCTE.[7] However, the Commission stated that waivers could be granted for the tariffed offering of digital NCTE used in conjunction with loop facilities if there is wide variability among loop characteristics, the characteristics of each loop are unstable, or facilities are changed frequently or are subject to extraordinary interference.[8]

2. In June of 1983, the Commission initiated this investigation into numerous issues relating to customer provision of analog NCTE.[9] The analog NCTE at issue here involves equipment placed at the customer's premises; although such equipment appeared to be CPE, the functions performed by that equipment were not clearly specified by the tariff. The Commission stated that the policy issues regarding analog NCTE were identical to those of digital NCTE, although technical issues might be different. The policy determinations in the *Interconnection Order* regarding digital NCTE would apply, therefore, with equal force to analog equipment. Finally, the Commission directed AT&T to respond to three questions in this investigation:

1. What functions are performed by the NCTE associated with AT&T-provided local distribution channels for group-supergroup service?

2. Since the NCTE would be located on customer premises at the customer end of the AT&T-provided local distribution channel, it is CPE as defined in the Computer II proceeding. By offering the NCTE under tariff, is AT&T not in violation of the Commission's rules and policies?

3. What technical specifications are required for others to provide non-harmful and operable NCTE of this nature? Have ch specifications been made publicly available? What additional ones (if any) are required?[10]

## II. SUMMARY OF PLEADINGS

3. AT&T filed a direct case in response to these questions. Reply comments were filed by MCI Telecommunications Corporation/Western Union International (MCI), International Business Machines Corporation (IBM) and the Independent Data Communications Manufacturers Association (IDCMA). AT&T filed a response.

4. AT&T asserted that analog NCTE provides limited functions principally required to accommodate variable transmission characteristics in local distribution facilities. Furthermore, AT&T alleged that each piece of analog NCTE might require further modification when the local distribution facility is changed. Thus, AT&T essentially argued that because of the variety of components that constitute group and supergroup NCTE, and because determination of such components is dependent upon the unique characteristics of individual local distribution facilities, provision of analog NCTE by the carrier provides a standard interface that promotes competition among terminal equipment vendors. AT&T concluded that analog NCTE must be provided by AT&T as an integral part of the group and supergroup service. AT&T Direct Case at 7, 18-19.

5. MCI argued that it should have an opportunity to purchase analog NCTE from a variety of vendors. MCI Reply at 4. It claimed that AT&T failed to show that analog NCTE must be provided as an integral part of the group and supergroup service. MCI, IBM, and IDCMA all concluded that analog NCTE is CPE and must be unbundled and detariffed. *Id.* at 6; IBM Reply at 12; IDCMA Comments at 4.

6. In response, AT&T argued that analog NCTE provides essential service functions and accordingly cannot properly be included as CPE within the definition of the *Computer II Inquiry*. AT&T Response at 3. Moreover, AT&T asserted, provision of analog NCTE as an integral part of the group and supergroup offering will not adversely affect competition in the provision of terminal equipment. *Id.* at 7.

## III. DISCUSSION

7. Since the close of this record in August 1983, certain circumstances have changed. First, AT&T has divested itself of the Bell Operating Companies.[11] In that divestiture, the BOCs transferred to AT&T all of their embedded CPE except for certain categories of equipment included in Accounts 231 and 234. The equipment in those accounts includes, *inter alia*, NCTE. Second, the

Commission has eliminated the structural separation requirements for BOC provision of deregulated CPE and specifically stated that such NCTE may be offered on a non-structurally separated basis.[12] Third, the *Third Computer Inquiry* allowed remote activated loopback testing for digital NCTE to be performed as a network function on the carrier side of the demarcation point on either a bundled or unbundled basis as long as the necessary equipment does not interfere with the performance of competitive CPE.[13] Furthermore, the Commission stated that waivers could be granted to allow additional digital NCTE to be offered under tariff upon a showing that the public interest would be served thereby and that the same functions performed by unregulated CPE would not result in comparable efficiencies or services to the public.[14] Finally, in the *Eighth Report and Order* in the *Second Computer Inquiry* the Commission ordered that embedded digital NCTE be detariffed effective July 1, 1988.[15]

8. The *Eighth Report and Order* outlined the criteria the Commission will apply in determining whether a particular class of CPE must be deregulated. That Order stated:

> It is our intent, consistent with the objectives of the *Second Computer Inquiry*, to detariff all CPE for which there is a competitive market that can provide choice to users in their selection of telecommunications equipment. In certain limited circumstances, however, we recognize that leaving the equipment under regulation can provide the greatest public benefit. Such may be the case if: 1) the equipment is obsolete; 2) no competitive market exists; 3) there is very little equipment; 4) it is difficult for anyone other than the BOC to maintain and repair the CPE; and 5) the costs of preparing the equipment for transfer to the public and servicing it outside of regulation outweigh any possible benefits.[16]

9. In the case of analog NCTE, it may be necessary to consider the costs of developing interface standards, in addition to the costs of preparing the NCTE for transfer to the public and the cost of servicing it outside of regulation. Interim interface standards and protection criteria would first need to be specified in carrier tariffs. Then permanent standards would have to be developed and Part 68 amended to incorporate registration of analog NCTE.[17]

10. The current record in this proceeding does not contain sufficient information to determine the effect of these intervening events upon any final determination. We will therefore solicit additional comments focusing on matters such as the extent of subscriber use of analog NCTE, the market for it, unique technical features of analog NCTE, and cost issues. We specifically ask that parties respond to the following questions:

> A. How many analog group and supergroup NCTE devices are there currently in use and how many others are available for use, *i.e.*, in stock or in the marketing chain?
>
> B. What is the trend of analog group and supergroup NCTE use and production? What is the expected market demand for this NCTE over the next five years?
>
> C. How many manufacturers of analog group and supergroup NCTE are there?
>
> D. To what extent are maintenance and installation services available for analog group and supergroup NCTE, other than from the BOCs and other telephone companies?
>
> E. What technical characteristics or features warrant (or do not warrant) retaining analog group and supergroup NCTE under regulation pursuant to the *Interconnection Order* or *Eighth Report and Order* ?
>
> F. What would be the cost of developing standards, preparing the equipment for transfer, and servicing it outside of regulation?

## IV. PROCEDURAL REQUIREMENTS AND ORDERING CLAUSES

11. An original and seven copies of all pleadings shall be filed with the Acting Secretary of this Commission. In addition, one copy shall be delivered to this Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Acting Secretary, Federal Communications Commission, Washington, D.C. 20554.

12. *Ex parte* contacts *(i.e.,* written or oral communications that address either the procedural or substantive merits of the proceeding and are directed to any member, officer, or employee of this Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Acting Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Acting Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of this Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

13. IT IS THEREFORE ORDERED that comments may be filed no later than **May 9, 1988.** Reply comments may be filed no later than **May 24, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

### FOOTNOTES

[1] Group and supergroup facilities (sometimes described as broadband facilities) are analog channels with nominal bandwidths of 48 and 240 kHz, respectively. A group channel can be used to carry bundles of up to 12 nominal 4 kHz voice channels, and supergroups can be used for bundles of up to 60 such voice channels. The channels can be used to transport, in any combination, voice grade, sub-voice grade, high or low speed data signals.

[2] American Telephone and Telegraph Company, Offer of Facilities to Other Common Carriers, Docket No. 21499, 92 FCC 2d 1216 (1983), *recon. denied*, FCC 83-550, released Dec. 12, 1983.

[3] Petitions See king Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, CC Docket No. 81-216, 94 FCC 2d 5 (1983) (*Interconnection Order), recon. denied*, FCC 84-145, released Apr. 27, 1984.

[4] AT&T has used different nomenclature to identify similar or identical equipment. Our use of "NCTE" is intended to be generic so as to include CSUs, NCTE and CSU-like equipment without regard to the particular label affixed to such equipment in the tariffs, though this proceeding encompasses only group and supergroup analog NCTE.

[5] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry)*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order), aff' d sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *second further recon.*, FCC 84-190, released May 4, 1984.

[6] Policy and Rules Concerning Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, CC Docket No. 83-115, FCC 83-552, released Dec. 30, 1983.

[7] Embedded CPE generally includes all CPE owned by a carrier, including inventory, that was tariffed or subject to the separations process as of January 1, 1983. New CPE is any other CPE acquired by a carrier or manufactured by an affiliated entity after that date. *Further Reconsideration Order*, 88 FCC 2d at 513, 527-28.

[8] *Interconnection Order*, 94 FCC 2d at 20-21.

[9] American Telephone and Telegraph Company, CC Docket No. 83-752, Mimeo No. 4821, released June 20, 1983.

[10] *Id.* at para. 15.

[11] United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *aff' d* sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[12] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, 2 FCC Rcd 143 (1987) at n.89, recon., 3 FCC Rcd 22 (1987).

[13] Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072, 3102-3105 (1987).

[14] *Id.* at 3105.

[15] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, FCC 88-3, 3 FCC Rcd 477 (1988) (Eighth Report and Order).

[16] Eighth Report and Order at para. 14.

[17] *See* Interconnection Order, 94 FCC 2d at 22-23.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

HUDSON VALLEY MOBILE TELEPHONE, INC. File No. 21192-CD-TC-01-88

for consent to transfer of control to

ARCH CAPITOL DISTRICT, INC.

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 4, 1988; Released: April 13, 1988**

By the Chief, Mobile Services Division:

1. Message Center Beepers, Inc. (Message Center) has filed a Petition to Deny the captioned assignment application of Hudson Valley Mobile Telephone, Inc. (Hudson Valley) and Arch Capitol District, Inc. (Arch Capitol). Responsive pleadings have been filed. We dismiss the petition for the following reasons.

2. Section 22.30 of the Commission's Rules states that Petitions to Deny must "be supported by affidavit of a person or persons with personal knowledge" of the facts alledged in the petition. Message Center has not filed any affidavit, whatsoever, in support of its Petition addressed to the Chief of the Common Carrier Bureau (CCB). We note that Message Center has provided an affidavit from a Mr. Charles H. Saile in a pleading to the Private Radio Bureau,[1] in support of its instant charge of anticompetitive behavior against Arch Capitol. However, Mr. Saile's statement is not a legally sufficient affidavit under Part 22.30 requirements.[2] Accordingly, we will dismiss the petition.

3. We have reviewed the captioned application and find that it meets the requirements of the Commission's Rules and that granting it is in the public interest.

**ORDERING PARAGRAPHS**

4. WHEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED that the captioned application for assignment of Hudson Valley to Arch Capitol IS GRANTED;

5. IT IS FURTHER ORDERED that the Petition to Deny filed by Message Center IS DISMISSED.

6. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

**FOOTNOTES**

[1] "Reply" In the Matter of Business Radio Service station WNKJ994 licensed to Arch Capitol District, Inc., File No. 98787 (Private Radio Bureau), included as an attachment to the instant Petition to Deny against the captioned application.

[2] Black's Law Dictionary, Fifth Ed., defines "affidavit" as follows:

> "A written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."
>
> Mr. Saile's statement was not taken before a person with authority to adminster an oath. Nor does Mr. Saile's statement meet the alternative requirement, described in Section 1.16 of the Commission's Rules, recognizing that the statement is made under penalty of perjury.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CONTINENTAL TELEPHONE COMPANY
of Indiana, Inc. Request for
Waiver of Part 69 of the
Commission's Rules

**ORDER**

**Adopted: March 31, 1988; Released: April 13, 1988**

By the Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. Continental Telephone Company of Indiana, Inc. (Contel) seeks to introduce centralized equal exchange access service for interexchange carriers (ICs) in Indiana. On July 22, 1987, it filed a request for waiver of Part 69 of the Commission's Rules (if such waiver is necessary) to permit revision of its Tariff F.C.C. No. 1 to offer the service.[1] Contel has not concurrently filed tariff revisions, but it has sought authority under Section 214 of the Communications Act to construct and lease transmission facilities that would be necessary to provide this service. Contel's Section 214 application remains pending. No comments were filed in response to Contel's waiver request.

## II. BACKGROUND AND PLEADING

2. On June 16, 1987, Contel filed an application for Section 214 authority to construct and lease transmission facilities necessary to provide centralized equal exchange access service to ICs in Indiana. Contel Waiver Request at 1. Contel is proposing to connect 69 of its 77 exchanges (almost 130,000 lines) to a virtual equal access tandem switch in order to provide ICs with centralized equal access. Contel maintains that this proposed arrangement will increase the likelihood that ICs will provide services in these small exchanges. According to Contel, all originating interLATA traffic will be concentrated in the one tandem switch with virtual equal access capabilities. Terminating traffic would be delivered either on a centralized basis or through existing terminating arrangements. Contel would construct one fiber optic cable and lease other fiber optic facilities. *Id.* at 2.

3. Contel projects the interstate revenue requirement associated with this access arrangement to be approximately $430,000 annually. Contel proposes to recover that portion of the revenue requirement associated with switch costs through a separate rate element applicable to each originating minute of use. Contel requests a waiver of the Commission's Part 69 access charge rules to allow Contel to recover these costs through a separate rate element. The remaining revenue requirement would be recovered through the existing transport rate element. Transport mileage would be measured between the relevant end office and the tandem switch, which would be located at Seymour, Indiana. ICs would have the option of interconnecting with the Seymour switch at Seymour, Columbus, Greenwood, or Indianapolis without incurring additional transport charges. Contel says that a Part 69 waiver is not necessary for this proposed application of transport charges, but has requested a waiver in case the Commission takes a different view. *Id.* at 3.

## III. DISCUSSION

4. The current Part 69 rules do not establish a separate rate element to recover equal access conversion costs. However, pursuant to various waivers, all of the Bell Operating Companies (BOCs) and several of the independent telephone companies currently use a separate rate element for recovery of equal access costs assigned to the interstate jurisdiction. *See, e.g., Petitions for Recovery of Equal Access and Network Reconfiguration Costs*, FCC 85-628, released Dec. 9, 1985. These BOC equal access charges do not serve the same function as the proposed Contel charge. The BOC charges are designed, at least in part, to recover end office costs that are apportioned to the Local Switching element under the present Part 69 rules.

5. Contel's equal access recovery charge would be designed to recover tandem switching costs. Interstate tandem switching investment is normally assigned to the common transport access element pursuant to subsection 69.306(c) of the Commission's Rules, 47 C.F.R. § 69.306(c). Some portion of tandem switching investment might be classified as equal access investment, which is assigned to the local switching element pursuant to Section 69.308 of the Commission's Rules, 47 C.F.R. § 69.308, but none of the Contel tandem switching investment appears to qualify as equal access equipment for purposes of jurisdictional separations, because those Rules define equal access investment as limited to expenditures for converting central offices which serve competitive interexchange carriers or are subject to a bona fide request to provide equal access. Subsection 36.191(a) of the Commission's Rules, 47 C.F.R. § 36.191(a). Contel apparently has no competitive interexchange carrier customers in the exchanges to be served by the proposed tandem, nor has it received any conversion requests. Therefore, all of the relevant costs would be classified as transport for purposes of the Part 69 access charge rules. The Commission has granted an indefinite waiver of the Part 69 rules governing the recovery of Transport costs to allow local exchange carriers to recover the cost of dedicated and common transport through any type of charge that complies with the Commission's general tariff requirements.[2] That waiver is broad enough to permit Contel to establish the proposed rate element for tandem switch costs Contel describes as equal access costs. [3]

6. Contel also asks us to find that no Part 69 waivers are necessary for the proposed application of its transport charge to the mileage between the relevant end office and the tandem switch located at Seymour, Indiana, even though ICs would have the option of interconnecting via the fiber optic cable with the Seymour switch at Seymour, Columbus, Greenwood, or Indianapolis without incurring additional transport charges. The existing waivers would also encompass that charge.[4] Thus, we find that Contel

does not require any new waivers of the Commission's access charge rules at this time to file the rate element described in the Contel petition.

## IV. ORDERING CLAUSE

7. IT IS THEREFORE ORDERED that the Continental Telephone Company of Indiana, Inc. Request for Waiver of Part 69 of the Commission's Rules IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

## FOOTNOTES

[1] Contel's waiver request was submitted in the form of a letter from Lawrence P. Keller, Director-Federal Regulatory, Contel Services Corporation to William J. Tricarico, Secretary, dated July 22, 1987. Contel also requests, at 5, n. 2 "whatever conforming waiver may be necessary of [the Commission's] separations requirements (Part67/new Part 36) so that separations of CTC of Indiana's equal access plant will be consistent with the rate treatment permitted under the Part 69 rules." This request is too vague to warrant consideration of whether any other waivers are necessary or justified. This request is accordingly denied.

[2] *See* AT&T, 94 FCC 2d 545 (1983); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 97 FCC 2d 834 (1984); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 85-87, released Feb. 27, 1985.

[3] Revision or termination of that waiver or of other applicable rules or orders would require conformance by Contel in this as in other cases.

[4] The fact that the proposed structure is included within the rule waiver does not, however, imply that it is *ipso facto* acceptable. The structure and rate must comply with the general requirements of the Communications Act that they be reasonable and not unreasonably discriminatory. *See* Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201 and 202. The consideration of such issues is a matter for the tariff review process.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In Re Applications of

TGE COMMUNICATIONS, INC. File No. 00174-CL-TC-1-88

for Commission Consent to Transfer of Control of the Bradenton, Florida Non-Wireline Cellular Permit to McCaw Communications of Bradenton, Inc.,

TREASURE COAST CELLULAR, INC. File No. 00181-CL-AL-1-88

for Commission Consent to Assignment of the Ft. Pierce, Florida Non-Wireline Cellular Permit to McCaw Communications of Ft. Pierce, Inc.

RENO CELLULAR TELEPHONE COMPANY File No. 00175-CL-TC-1-88

for Commission Consent to Transfer of Control of the Reno, Nevada Non-Wireline Cellular License to McCaw Communications of the Pacific, Inc., KNKA516

CELIA P. BIOSCA File No. 00179-CL-TC-1-88

for Commission Consent to Transfer of Control of the Rochester, Minnesota Non-Wireline Cellular Permit to McCaw Communications of Rochester, Inc.,

NATIONAL CELLULAR COMMUNICATIONS, INC. File No. 00173-CL-TC-1-88

for Commission Consent to Transfer of Control of the Rockford, Illinois Non-Wireline Cellular Permit to McCaw Communications of Rockford, Inc.,

H. P. SHOEBRIDGE File No. 00182-CL-AL-88

for Commission Consent to Transfer of Control of the Yuba City, California Non-Wireline Cellular Permit to McCaw Communications of Yuba City, Inc.,

SATSUM-HOUMA/ THIBODAUX, INC. File No. 00190-CL-TC-1-88

for Commission Consent to Transfer of Control of the Houma-Thibodaux Non-Wireline Cellular Permit to McCaw Communications of Houma, Inc.

BURTSCHI ENTERPRISES, INC. File No. 00235-CL-TC-1-88

for Commission Consent to Transfer of Control of the Fort Collins-Loveland, Colorado Non-Wireline Cellular Permit to McCaw Communications of Fort Collins, Inc.

GEM CELLULAR File No. 26178-CL-P-154-A-86

for Commission Consent to Assignment of the New London, Connecticut Non-Wireline Cellular Permit to Metro Mobile CTS of New London, Inc.

SAMUEL PARDOE File No. 00251-CL-TC-1-88

for Commission Consent to Transfer of Control of the Olympia, Washington Non-Wireline Cellular Permit to McCaw Communications of Olympia, Inc.

JEANINE A. HOCHHALTER File No. 00262-CL-AL-1-88

for Commission Consent to Assignment of the Salem, Oregon Non-Wireline Cellular Permit to McCaw Communications of Salem, Inc.

GEORGE H. BILLINGS File No. 00332-CL-TC-1-88

for Commission Consent to Transfer of Control of B-CS Cellular Telephone Company, Inc., to McCaw Communications of Bryan, Inc.

J. WINSOR CORPORATION File No. 00369-CL-TC-1-88

for Commission Consent to Transfer of Control of Greeley Cellular Telephone Company to McCaw Communications of Greeley, Inc.

CALIFORNIA MOBILE PHONES, INC. File No. 00275-CL-TC-1-88

for Commission Consent to Transfer Control of the Redding, California Non-Wireline Cellular

Permit to McCaw Redding, Inc.

DENNIS O'NEILL File No. 00276-CL-TC-l-88
for Commission Consent to
Assignment of the Aguadilla, Puerto Rico
Non-Wireline Cellular Permit
to McCaw Communications of Puerto
Rico, Inc.

ARNOLD C. LEONG File No. 00273-CL-TC-l-88

for Commission Consent to
Transfer Control of the Lafayette,
Louisiana Non-Wireline Cellular
Permit to McCaw Lafayette, Inc.

CUMBERLAND CELLULAR TELEPHONE COMPANY File No. 00279-CL-TC-l-88

for Commission Consent to Transfer
of Control of the Clarksville-
Hopkinsville, Tennessee/Kentucky
Non-Wireline Cellular Permit
to McCaw Communications of
Clarksville, Inc.

BILL G. RHOADS File No. 00448-CL-TC-l-88

for Commission Consent to Transfer of
Control of Talcom, Inc. to McCaw
Communications of Florida, Inc.

RAYMON R. FINCH, JR. File No. 00445-CL-TC-l-88

for Commission Consent to Transfer
of Control of Mayaguez Cellular Telephone
Company to McCaw Communications of
Puerto Rico, Inc.

CINKUTIS, INC. File No. 00444-CL-TC-l-88

for Commission Consent to Transfer of
Control of Cinkutis, Inc. to McCaw
Communications of Springfield, Inc.

JAMES H. SUMMERS File No. 00450-CL-TC-l-88

for Commission Consent to Transfer of
Control of Salinas Cellular Telephone
Company to McCaw Communications of
the Pacific, Inc.

MICHAEL J. WALDMAN File No. 00440-CL-TC-l-88

for Commission Consent to Transfer of
Control of Champaign Celltelco to
McCaw Communications of Champaign, Inc.

J. F. KEHOE JOINT VENTURE File No. 00439-CL-TC-l-88

for Commission Consent to Transfer of
Control of Cellular One of Terre Haute,
Inc. to McCaw Communications of Terre
Haute, Inc.

FRANK R. AVALLONE, JR. File No. 00449-CL-TC-l-88

for Commission Consent to Transfer of
Control of Johnstown Cellular
Communications, Inc. to McCaw
Communications of the Great Lakes, Inc.

WILLIAM M. RYAN File No. 00497-CL-TC-l-88

for Commission Consent to the Assignment
of the Sarasota, Florida Non-wireline
Cellular Permit to McCaw Communications
of Sarasota, Inc.

LEE CHARLES AND NEVA BROOKS File No. 00496-CL-AL-l-88

for Commission Consent to the Assignment
of the Non-wireline Cellular Construction
Permit for Visalia-Tulare-Porterville,
California to McCaw Communications of the
Pacific, Inc.

## MEMORANDUM OPINION AND ORDER

**Adopted: April 5, 1988; Released: April 13, 1988**

By the Chief, Mobile Services Division:

1. The United States Independent Cellular Telephone Association, *et. al.* (USICTA) has filed petitions to deny the captioned applications for transfer of control of non-wireline cellular permits and licenses, referred to hereinafter as follows: TGE Communications Inc. (TGE); Treasure Coast Cellular Inc. (Treasure Coast); Reno Cellular Telephone Company (Reno); Celia P. Biosca (Biosca); National Cellular Communications, Inc. (National); H. P. Shoebridge (Shoebridge); Satsum-Houma/Thibodaux, Inc. (Satsum); Burtschi Enterprises, Inc. (Burtschi); GEM Cellular (GEM); Samuel Pardoe (Pardoe); Jeanine A. Hochhalter (Hochhalter); George H. Billings (Billings); J. Winsor Corporation (Winsor); California Mobile Phones, Inc. (California Mobile); Dennis O'Neill (O'Neill); Arnold C. Leong (Leong); Cumberland Cellular Telephone Company (Cumberland); Bill G. Rhoads (Rhoads); Raymon R. Finch, Jr.(Finch); Cinkutis, Inc. (Cinkutis); James H. Summers (Summers); Michael J. Waldman (Waldman); J. F. Kehoe Joint Venture (Kehoe); Frank R. Avallone, Jr. (Avallone); William M. Ryan (Ryan); and Lee Charles and Neva Brooks (Brooks).

2. All of the transferors have filed oppositions to the petitions to deny, with the exception of the transferors in Biosca, National, GEM and Hochhalter, Cinkutis, Avallone, and Brooks. In addition, subsidiaries of McCaw Communications Inc. (hereinafter referred to collectively as McCaw), the transferees in all the transfers except New London, Connecticut, have filed oppositions to the petitions to deny. An opposition has been filed by Metro Mobile CTS of New London, Inc. (Metro Mobile) for the GEM transfer of New London. USICTA has filed replies in all of the captioned markets. A motion to disqualify counsel has been filed by Satsum, Houma/Thibodaux Cellular Partnership (HTCP), WM Cellular Associates III (WM-III) and Richard Reiman (Reiman), the transferor in the Satsum proceeding, against the law firm of Ginsburg, Feldman & Bress in the Satsum proceeding.[1]

## BACKGROUND

3. In its petitions, USICTA makes the following arguments: a) that the for-profit sale of a construction permit that is contemplated by the captioned transfer applications are prohibited by Sections 301 and 304 of the Communications Act of 1934, as amended;(Act)[2] b) that the transferor has not met its burden of proof pursuant to Section 22.40(b) of the Rules to demonstrate that it did not speculate in the cellular licenses; [3] c) that McCaw is not financially qualified because the letter McCaw relies on to support its claim of reasonable assurance of funding does not meet the requirements of Section 22.917 of the Rules;[4] d) that the application does not demonstrate that the transfer of the permit would be in the public interest; and that the applicant has misrepresented the facts in its public interest showing;[5] and e) that McCaw does not possess the character qualifications to become a Commission permittee for those markets in which it is attempting to buy a stand-alone system because, USICTA alleges, McCaw has engaged in anticompetititve coercive practices to obtain a permit for a stand-alone system in the Chico, California market.[6]

4. In their respective oppositions, McCaw, Metro, and the transferors, argue that the USICTA petition is procedurally defective[7] because it has not demonstrated its own standing or that of its purported members. They argue that the petition has failed to: a) include an affidavit affirming the facts alleged in the pleadings to establish injury to USICTA or its purported members, as required by the Act and the Rules, and b) state any objective facts supporting USICTA's claim that the grant of the captioned application would injure it or its purported members and that the Act protects USICTA from such injury. The oppositions argue that USICTA's attack on the Common Carrier Bureau's decision in *Madison Cellular Telephone Co.*, 2 FCC Rcd. 5397 (Comm. Carr. Bur. 1987) (*Madison Decision)* is procedurally defective as untimely because USICTA was required under the provisions of Sections 1.106 and 1.115 of the Rules to file petitions for reconsideration or applications for review within thirty days of the date of public notice of its order. The oppositions also include arguments that: the proposed transfer is fully consistent with Sections 301 and 304 of the Communications Act, Commission Rules and past precedent; McCaw has demonstrated that the benefits of its proposed regional systems would serve the public interest; the transferor has met its burden of demonstrating that it was not speculating in cellular construction permits within the meaning of Section 22.40(b) of the Rules; McCaw is financially qualified to consummate the proposed acquisition; and McCaw has not engaged in anti-competitive conduct and thus does possess the character qualifications to become a Commission licensee.

5. In its replies, USICTA makes the following arguments: a) that USICTA has standing, both as an association and on behalf of its members, to petition the captioned transfer because it has submitted an affidavit in its reply to demonstrate that it would be injured by such transfer;[8] b) that the for-profit sale of the captioned construction permit is prohibited by Sections 301 and 304 of the Act; c) that the transferor has not demonstrated that it obtained the permit with the intent to construct; d) that McCaw's financial qualifications have not been fully demonstated to be in compliance with the Commission's requirements; e) that McCaw has failed to make the public interest demonstration required by Section 22.13(a)(4) of the Commission's Rules; and e) that USICTA's evidence of McCaw's anticompetitive actions raises a substantial and material question of fact as to McCaw's qualifications to be a Commission licensee.

## DISCUSSION

6. The issues raised by USICTA in the cases *sub judice* are virtually identical to the issues USICTA raised in *Corpus Christi Cellular Telephone Company* (*Corpus Christi Decision),* DA 88-428, released April 4, 1988.[9] Thus, for the reasons stated in the *Corpus Christi Decision,* we find that grant of the captioned applications is in the public interest.

## ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED, That the captioned applications, seeking consent to transfers of control, ARE GRANTED.

8. This Order is issued under Section 0.291 of the Commission's Rules and is effective immediately. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order. *See* 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

## FOOTNOTES

[1] The transferor argues that the law firm of Ginsburg, Feldman & Bress must discontinue its representation of USICTA because it also represents Richard Reiman who is a general partner of WM Cellular Associates III which in turn is a general partner of the transferor thereby creating, it alleges, a conflict of interest in violation of the Disciplinary Rules of the ABA Code of Professional Responsibility. In *Opal Chadwell,* 2 FCC Rcd. 3458 (1987), the Commission set forth guidelines in cases alleging attorney misconduct. Issues related to attorney misconduct should not be adjudicated in the course of an ongoing licensing proceeding

except where the allegations of attorney misconduct are "inextricably related" to the questions being litigated. "[F]urther action on the ethical ramifications of the attorney's conduct will generally be deferred until final resolution of the licensing proceeding . . . ." *Id.* The Office of General Counsel then determines what action is appropriate. *Id.* We find that the allegations of attorney misconduct are not inextricably related to the Satsum proceeding. Thus, we find that this is not the appropriate forum to adjudicate those allegations.

[2] USICTA did not make this argument in its petitions against the Reno and Billings transfers.

[3] USICTA does not make this argument in its petitions against the Burtschi, Reno, Satsum and Billings transfers.

[4] USICTA does not make this argument in its petition against the GEM transfer.

[5] USICTA does not make this argument in its petitions against the Burtschi, Satsum and GEM transfers.

[6] USICTA does not make this argument in its petitions against the Treasure Coast, Reno, Biosca, National, Satsum and GEM transfers but makes these character allegations in supplements to its petitions to deny it has filed in Reno, Burtschi, Shoebridge, Biosca, National, Treasure Coast, Satsum and TGE.

[7] This argument is not addressed in the oppositions filed by the transferors in the Shoebridge, Leong, O'Neill, Cinkutis and Cumberland transfers.

[8] We note that USICTA's affidavits were submitted well beyond the date required by our Rules for their submission, which is the date the petition is filed. However, we will accept these late-filed affidavits *nunc pro tunc*. *See KQED, Inc.*, 88 FCC 2d 1159, 1166-67 (1982).

[9] In some cases, the declarations submitted by the transferors to support their Section 22.40(b) showings, are different from the declarations submitted in the *Corpus Christi Decision*, and are contested by USICTA. We find the difference to be without distinction. In each of these cases, the declaration indicates that the transferor acquired the construction permit for the purpose of constructing and operating the system, and that its decision to sell was prompted by changing business conditions and its determination that it would not be economical to build the system on a stand-alone basis. We find these showings also satisfy Section 22.40(b) of the Rules as well as the *Madison Decision*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AETNA LIFE INSURANCE COMPANY and
AETNA CASUALTY and
SURETY COMPANY,
Plaintiffs,

v. File No. E-87-7

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

US SPRINT COMMUNICATIONS COMPANY,
Plaintiff,

v. File No. E-87-33

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

ANR PIPELINE COMPANY,
Plaintiff,

v. File No. E-87-44

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v. File No. E-87-45

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

HARTFORD FIRE INSURANCE COMPANY,
Plaintiff,

v. File No. E-87-46

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

UNITED AIRLINES, INC.,
Plaintiff,

v. File No. E-87-55

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

AUTOMATIC DATA PROCESSING, INC.,
Plaintiff,

v. File No. E-87-56

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

MUTUAL OF OMAHA INSURANCE CO.,
Plaintiff,

v. File No. E-87-57

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

CHEMICAL BANK,
Plaintiff,

v. File No. E-88-38

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

CHASE MANHATTAN BANK,
Plaintiff,

v. File No. IC-87-02652

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

FIRST INTERSTATE SERVICES
COMPANY,
Plaintiff,

v. File No. IC-87-02653

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

TEXACO, INC.,
Plaintiff,

v. File No. IC-87-04524

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Defendant.

## MEMORANDUM OPINION AND ORDER

**Adopted: April 4, 1988; Released: April 13, 1988**

By the Chief, Common Carrier Bureau:

1. We have nine formal and three informal complaints before us, all alleging that the rates for 56 kilobits per second (kbps) digital local loop and interexchange private line circuits previously offered in the American Telephone and Telegraph (AT&T) Digital Dataphone Service (DDS) Tariff F.C.C. No. 267 prior to April 27, 1985, were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act (the Act), 47 U.S.C. § 201(b).[1] The complainants seek damages for alleged overcharges incurred as a result of what they characterize as unlawful Tariff 267 rates.[2] Since each of the complainants request damages for a period dating more than two years prior to the filing of a complaint with the Commission, [3] this order resolves an important threshold question raised by AT&T in its answers and motions to dismiss whether substantial portions of the complainants' claims are barred by the applicable statute of limitations contained in Section 415(c) of the Act, 47 U.S.C. § 415(c). That section generally provides that any action for damages based on overcharges must be filed within the two years from the time the cause of action accrues,[4] and thus, precludes recovery on otherwise valid claims for time periods more than two years prior to the filing of a complaint. For the reasons set forth below, we find that Section 415(c) is applicable to complainants' claims. Therefore, the complainants' claims for damages will be dismissed to the extent they seek to recover overcharges alleged to have occurred beyond the two year period of limitation specified in Section 415(c).[5] Insofar as Section 415(c) does not bar their claims, the parties shall proceed in the manner described below.[6]

### I. BACKGROUND

2. Before turning to the parties' statute of limitations claims, a review of the long and complicated history surrounding AT&T's DDS offerings is appropriate.[7] Almost from their inception, AT&T's DDS offerings under Tariff 267 have been the subject of complex Commission proceedings. In a Memorandum Opinion and Order released December 14, 1974, the Commission first authorized AT&T's operation of DDS under interim rates but initiated a DDS rate hearing because it found the cost and market studies submitted by AT&T in support of the tariff to be inadequate. *AT&T*, 50 FCC 2d 501 (1974) (Docket 20288). After a full hearing on the matter, the Commission ruled in March 1977 that the Tariff 267 rates had not been adequately cost justified and were noncompensatory, *i.e.*, were targeted to earn a return below appropriate levels.[8] It also found that AT&T had not substantiated the lawfulness of its rate structure which provided different rates for different speeds of service, and that these rates were not cost-based. For these and other reasons, the Commission directed AT&T to file within 30 days an interim tariff offering DDS at rates designed to yield the carrier's overall prescribed rate of return. It also required AT&T to file a fully cost-justified tariff for DDS no later than its submission of other private line tariff filings required by the Commission's 1976 decision in CC Docket No. 18128.[9] In the event it was unable to submit a complying tariff revision, AT&T was permitted to file a DDS tariff in accordance with the rate structure in its Multischedule Private Line (MPL) tariff, AT&T Tariff F.C.C. No. 260, Series 2000, 3000 and 8000. *Id.* at 805.[10]

3. On February 22, 1977, AT&T filed rate and rate structure revisions to Tariff 267 patterned on its Tariff 260 private line analog data transmission service offerings.[11] Subsequently, the Commission permitted the revisions to become effective without suspension or investigation after stating its belief that AT&T's method of calculating the intercity 56 kbps rates based on the Tariff 260 rate structure would not be unreasonable for an interim period. *AT&T*, 63 FCC 2d 936, 938 (1977).[12]

4. In July 1977 AT&T filed further revisions to Tariff 267 in purported compliance with the Commission's directives. *See* Transmittal No. 12790 (filed July 25, 1977). However, the rates proposed in that filing were rejected by the Commission because they had not been shown to be cost justified in accordance with the specific requirements of the Commission's orders in Dockets 20288 and 18128.[13] The Commission directed AT&T to inform it within 60 days as to when it would file a fully justified DDS tariff meeting the requirements of all applicable Commission rules and orders. 67 FCC 2d at 1231. In the meantime, it was allowed to retain the existing DDS rates which had been fashioned after its Tariff 260 analog rates then in effect.[14] Subsequently, the Commission denied a petition for reconsideration filed by AT&T, but gave AT&T an additional 30 days within which to inform the Commission as to when it would file a fully cost-justified DDS tariff. *AT&T*, 70 FCC 2d 616, 634 (1979). On the due date for the carrier's response, however, AT&T requested a meeting with the Common Carrier Bureau (Bureau) to discuss and interpret the Commission's tariff justification requirements as they applied to its expected new DDS tariff filing.[15] AT&T represented that it would be in a position to make a reasoned judgment as to when it would file its tariff revisions at the conclusion of such a discussion. No discussions, however, were ever held.

5. In late 1979, the Commission took two significant steps toward achieving overall cost justification for AT&T's rates.[16] By separate orders adopted in September 1979, the Commission instituted formal Rule Making proceedings proposing a prescription of cost allocation procedures for all of AT&T's services[17] and a possible restructuring of AT&T's private line tariffs.[18] The initial notice instituting Docket 79-245 had contemplated further revisions to the fully distributed cost methodology (FDC-7) prescribed in Docket 18128. However, the Commission found in its *Report and Order* adopted in January 1981 that FDC-7 did not offer a workable solution to the problem of allocating AT&T's costs, at least for the short term.[19] Consequently, the Commission prescribed an interim cost allocation manual (ICAM) employing an allocation methodology similar to the relative use methodology – FDC – considered in Docket 18128. The ICAM allocated costs among three primary categories – Message Telecommunications Service (MTS), Wide Area Telecommunications Service (WATS), and private line services – in accordance with procedures set forth in the Jurisdictional Separations Manual.[20]

6. On November 25, 1981, GTE Telenet Communications Corporation (Telenet) filed a formal complaint with the Commission seeking damages for what it alleged were excessive rates paid by it for AT&T's 56 kbps DDS under Tariff 267.[21] Telenet argued, as do the subject complain-

ants, that AT&T's rates of return on its 56 kbps DDS service substantially exceeded AT&T's authorized system rate of return in every year covered by its complaint, and thus violated Section 201(b) of the Act. In addition, Telenet argued that AT&T's unreasonable delay in filing fully justified rates was unreasonable and, thus, a *prima facie* violation of Section 201, as well as the numerous Commission orders (cited above) requiring establishment of a lawful DDS tariff. AT&T, on the other hand, maintained that the mere fact that its 56 kbps DDS rates may have earned in excess of the prescribed overall rate of return for the company provided an insufficient basis for a damage claim or an action looking toward the prescription of future rates.

7. On October 3, 1983, AT&T filed a set of eight tariffs to replace its then existing FCC tariffs for interstate services.[22] Among the proposed tariffs was AT&T's Tariff F.C.C. No. 3 (Tariff 3) which set the rates and provisions for most of AT&T's terrestrial private line services, including DDS. The Commission, however, suspended the effectiveness of the tariffs, including Tariff 3, and set them for investigation.[23] Tariff 3, along with the others, was subsequently found to be unlawful by the Commission.[24] Ultimately, on April 27, 1985, new tariff provisions and rates filed on January 18, 1985, in AT&T Communications Tariff F.C.C. Nos. 9, 10 and 11 applicable to, *inter alia*, DDS, were allowed to become effective and the Tariff 267 rates were cancelled.[25]

8. On May 29, 1986, we issued our initial order in the Telenet complaint proceeding in which we found against AT&T in part.[26] The parties were directed to undertake good faith efforts to negotiate a financial settlement within the parameters set forth in the order. On June 16, 1986, AT&T and Telenet filed a "Settlement Agreement" along with a "Joint Motion to Dismiss Complaint and Vacate Common Carrier Bureau Order." A crucial element of the Settlement Agreement was that its implementation was contingent on our granting a joint motion to vacate the *Telenet Order*. After consideration of the equities involved, we granted the parties' motion to vacate and approved the Settlement Agreement.[27] Subsequently, the subject complaints were filed by users of AT&T's 56 kbps DDS services all seeking restitution for alleged overcharges assessed by AT&T under Tariff 267.[28]

## II. CONTENTIONS OF THE PARTIES

9. The complainants, relying principally upon our finding against AT&T in the vacated *Telenet Order*, argue that they were similarly situated users of the services during the relevant time period and that, therefore, they are entitled to damages based on the same findings and conclusions reached in that proceeding.[29] In their oppositions to AT&T's motions to dismiss, the complainants acknowledge that most of the alleged overcharges occurred more than two years before they filed their complaints with the Commission. They contend, however, that their claims are timely because their cause of action against AT&T did not accrue and the statute of limitations did not begin to run until May 29, 1986, the date we released our *Telenet Order*.[30] The complainants argue that until that time, given AT&T's unreasonable delay in revising its DDS rates and the circumstances surrounding the Commission's own inability to prescribe cost-justified rates, they were not aware and had no basis for complaining that AT&T's 56 kbps rates were unlawful.

10. As a separate but related argument, the complainants assert that the statute of limitations was tolled because AT&T "fraudulently" or "wrongfully" concealed the nature of its excessive 56 kbps rates. The complainants state that AT&T was under a continuing obligation to replace the Tariff 267 rates with lawful, cost-justified rates. Complainants contend that, by failing to revise those rates in a brief timeframe, AT&T knowingly and fraudulently held out that its 56 kbps DDS rates were just and reasonable. Complainants add that this "fraudulent" conduct, coupled with the Commission's inability independently to determine and prescribe cost-justified rates because of AT&T's failure to implement adequate costing methodology, served to conceal the fact that the 56 kbps rates were excessive. Complainants contend that without such knowledge they had no basis for challenging AT&T's 56 kbps DDS offerings. Consequently, complainants argue, the statute of limitations was tolled until they discovered the unlawfulness of those rates.

11. AT&T maintains that complainants' arguments are without merit. It argues that, while the *Telenet Order* may have concerned the complainants' cause of action, it did not create it and is therefore immaterial in determining when the statute of limitations period begins to run. It states that all of the facts upon which the complainants base their claims were in existence at least since 1981 and argues that nothing precluded the complainants from filing their claims within the statutory period irrespective of the outcome of the Telenet proceeding.[31] AT&T argues that the complainants have not shown that they could not, through the exercise of due diligence, have maintained familiarity with the publicly available information surrounding its 56 kbps DDS offerings, including the Telenet complaint proceeding. Therefore, AT&T contends that the complainants must be held chargeable with knowledge of the facts underlying their claims long before the *Telenet Order* was released on May 29, 1986. In addition, AT&T argues that the complainants' claims of fraudulent concealment are invalid on their face because complainants have failed to allege any acts of fraud or deceit with the degree of specificity or particularity necessary to support such a claim. In any event, AT&T contends, there was no concealment on its part since all of the events surrounding its 56 kbps offerings, including its efforts to comply with Commission directives that cost-justified rates be filed, were matters of public record as early as 1981. Moreover, AT&T argues that at a minimum a fraudulent concealment claim must involve a duty to disclose some material fact. AT&T maintains that it owed no such duty to complainants since it had no obligation to target its individual DDS rates to yield its overall rate of return and no legal duty to disclose individual DDS earnings to the complainants.

## III. DISCUSSION

12. It is clear that, barring unusual circumstances, the threshold requirement for pursuing a claim for telephone service overcharges under the Communications Act is that it be presented to the Commission within two years from the time the cause of action accrues.[32] The general rule of law, as complainants have acknowledged, is that the point when a cause of action accrues is when the carrier performs the alleged unlawful act, *i.e.*, the time the customer receives a bill for their service.[33] Complainants have set

forth several arguments in support of the position that the statutory bar did not accrue within the meaning of Section 415(c) until a later time.

13. We note at the outset that the purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." *Bunker Ramo Corp.*, 31 FCC 2d 449, 453 (1971). The statute is not discretionary and the lapse of time beyond the limitation period not only bars the remedy but also destroys the liability. *Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania*, 25 FCC 2d 385 (1970); *cf. Midstate Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 363-64 (1943); *Kansas City So. R. Co. v. Wolf*, 201 U.S. 133 (1923). The construction of Section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances. *Id* ; *see Thornwell Barnes Co. v. Illinois Bell*, 1 FCC 2d 1247 (1967); *Ward v. Northern Ohio Telephone Company*, 251 F. Supp. 606, *aff' d*, 381 F.2d 16 (6th Cir. 1967). For example, in *Bunker Ramo, supra*, the Commission identified two basic situations in which the strict application of the statute may be altered or affected:

> First, a statute of limitations does not begin to run until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law. Secondly, the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. 31 FCC 2d at 454.

14. Given this standard and the particular facts before us, we cannot accept the complainants' theory that the statutory period should not have commenced until May 29, 1986, the date we released our order in the *Telenet* proceeding. Complainants argue that prior to that time they were not, and could not have been expected to be, aware of the unlawfulness of AT&T's 56 kbps charges. The Commission has held that the term discovery in a legal sense "does not mean actual discovery of the defendants' wrong; rather it means that the plaintiff is held to have 'discovered' defendants wrong when the exercise of reasonable diligence could have uncovered the facts." *Thornwell Barnes Co.*, 1 FCC 2d at 1254. In our view, the knowledge of the operative facts complainants cite as supporting their allegations that AT&T's 56 kbps DDS rates earned excessive returns, were chargeable by law upon the complainants long before we released our *Telenet Order*. The record shows that from at least as early as 1981 there was sufficient public information available regarding AT&T's DDS costing practices, including matters raised in the *Telenet* complaint proceeding, to put complainants on notice of possible defects in AT&T's 56 kbps offerings. Indeed, all of the information on which Telenet relied in filing its complaint was available to the public. Under these circumstances, we conclude that complainants have failed to show that they acted with due diligence in this case. Statements of ignorance, without more, are insufficient to avoid the statute. *See Charlotte Telecasters, Inc. v. Jefferson - Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Small v. Signal LP Gas, Inc.*, 548 F. Supp. 46 (E.D. Mo. 1982); *see also General Builders Supply Co. v. River Hill Coal*, 796 F.2d 8 (1st Cir. 1986).

15. We must also reject complainants' contention that no cause of action existed until we issued our *Telenet Order*.[34] Although the Commission allowed the Tariff 267 DDS rates to become effective without investigation and hearing for an indefinite period pending the filing of cost-justified rates, it did not prescribe these DDS rates as lawful.[35] Rather, the rates were carrier initiated rates which the Commission permitted to become effective on an interim basis. It is well established under Commission and judicial precedent that such rates may still be found unlawful in a future complaint proceeding should the complainant meet its burden of proof.[36] Thus, our determination in the *Telenet Order* was in no way a prerequisite to a claim for reimbursement of alleged Tariff 267 overcharges, and there is no reason why complainants could not have brought their overcharge claims, as Telenet did, within the statutory period.[37]

16. Nor do we find merit in the complainants' claims that the running of the statute was tolled by AT&T's "fraudulent" or "wrongful" concealment of its alleged misconduct. It is well established that the running of a limitation period may be tolled by active concealment of the facts giving rise to a cause of action by a defendant.[38] A complainant pleading fraudulent concealment, however, must establish more than merely wrongful conduct on the part of a defendant. It must also demonstrate that the wrongful conduct resulted in the knowing concealment of the operative facts forming the basis of the cause of action and that these facts were not discovered despite the exercise of due diligence. *See, e.g., Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978). Thus, complainants have the burden of both pleading and ultimately proving fraudulent concealment, and in order to carry this burden, must allege facts showing affirmative conduct on the part of AT&T "which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Id.* at 250; *see also Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1984), *reh' g denied*, 471 U.S. 1095 (1985). We conclude that none of the complainants have met that burden here. The sole averment directed to the fraudulent concealment argument is the broad allegation that AT&T's "failure to file cost-justified rates" as directed by the Commission while representing to its customers and the general public that its interim rates were lawful prevented complainants' discovery of the facts upon which they could have asserted a claim. Without more, however, these allegations are at best general and conclusory without any specification of acts of fraud or deceit within the limitations period.[39] Complainants do not even claim that they requested information from defendant and that their requests were denied. In the absence of allegations of specific acts of misconduct on the part of the defendant which, if true, could lead a reasonable person to believe that no cause of action existed, we do not find the record sufficient to satisfy the requisite elements justifying application of the fraudulent concealment doctrine. While it can be argued that AT&T acted wrongfully in failing to file cost-justified rates for an unreasonable period of time, we do not believe that such failure, if proven, would have resulted in the "fraudulent" concealment of any operative facts underlying the complainants' claims.[40] In any event, AT&T's efforts to comply with the Commission's directives to file cost-justified rates, as well as the Commission's discussions regarding those efforts, were all matters of public record from the beginning. As indicated above, while the Com-

mission allowed the admittedly defective Tariff 267 rates to become effective on an interim basis until AT&T could file permanent cost-justified rates, that action, as well as subsequent Commission actions taken in connection with its consideration of AT&T's Tariff 267 rate structure, cannot be said to have precluded a customer of AT&T's DDS service from challenging those rates, as Telenet did, by pursuing an overcharge claim by filing a complaint. *See MCI Telecommunications Corp.*, 85 FCC 2d at 1000.

17. The Commission has held that unawareness or ignorance of facts or law alone will not toll the statute of limitations. *Bunker Ramo Corp.*, 31 FCC 2d at 454. The statute of limitations will be tolled only for those who remain unaware or ignorant through no fault of their own. *Id.* In our view, the complainants knew, or by the exercise of due diligence should have known, all of the facts they needed to allege a cause of action against AT&T well within the statutory limitations period. Under these circumstances, complainants cannot successfully assert fraudulent concealment to avoid the limitations bar.

18. However, insofar as the limitations period does not bar their claims, the complainants raise additional issues. First, they question whether AT&T's Tariff 267 56 kbps DDS rates as applied to each complainant were unjust and unreasonable within the contemplation of Section 201(b) of the Act. We do not address this issue in this order. Instead, we will address this matter and set down a schedule for further proceedings in a conference among the parties to be scheduled following release of this order.

19. Second, a number of the complainants request that we find that AT&T's current 56 kbps DDS rates under Tariff 9 are unjust and unreasonable.[41] As noted above, the rate structure and cost justification underlying Tariff 9 differ substantially from AT&T's previous DDS offerings under Tariff 267. Therefore, an evaluation of reasonableness will necessarily require an examination of an array of cost, demand and other information which has not yet been developed. In order to facilitate the orderly submission of evidence on the Tariff 9 issues, we will sever complainants' Tariff 9 claims from these proceedings and incorporate them by reference into separate complaint proceedings. This matter will also be addressed at the conference referred to above and will be used to identify the specific procedures which must be followed to complete the record on Tariff 9 issues and to establish a schedule for such filings.

20. As noted above, the complaints filed by Chemical Bank and Texaco include requests for damages under Tariff 267 excluded completely by the Section 415(c) limitations period. Therefore, those complaints will be dismissed with respect to such claims in accordance with this decision. Chemical, to the extent it wishes to pursue its Tariff 9 claims, will be free to do so pursuant to procedures to be established at the above-referenced conference.

21. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that AT&T's motions to dismiss ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

22. IT IS FURTHER ORDERED, that all issues and arguments submitted by the complainants described in footnote 2 above concerning the lawfulness of AT&T's 56 kbps rates under Tariff 9 are hereby severed from these proceedings.

23. IT IS FURTHER ORDERED, that the claims filed by Chemical Bank and Texaco Inc. concerning the lawfulness of AT&T's Tariff 267 Kbps rates ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] The formal complainants include: Aetna Life Insurance Company and Aetna Casualty and Surety Company (Aetna); US Sprint Communications Company (US Sprint); ANR Pipeline Company (ANR); Federal Express Corporation (Federal Express); Hartford Fire Insurance Company (Hartford); United Airlines, Inc. (United Air); Automatic Data Processing, Inc. (ADP); Mutual of Omaha Insurance Co. (Mutual); and Chemical Bank (Chemical). The informal complainants include: Chase Manhattan Bank (Chase); First Interstate Service Co. (First Interstate); and Texaco, Inc. (Texaco). Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition.

[2] Tariff 267 was cancelled and replaced by AT&T's F.C.C. Tariff No. 9 effective April 27, 1985. Eight of the complainants (Aetna, US Sprint, ANR, Hartford, Mutual, Chemical, Chase and First Interstate) further contend that AT&T's current 56 kbps rates under Tariff 9 are also unjust and unreasonable. Each of these complainants, however, have stated their Tariff 9 claims in mostly generalized, conclusory terms. Since the facts underlying the rate structure and rate levels of Tariff 9 differ substantially from AT&T's previous DDS offerings under Tariff 267, we will herein sever all Tariff 9 issues from these proceedings and make them the subject of separate complaint proceedings in order to facilitate their orderly and expeditious resolution. *See infra* para. 17. We intend to schedule a conference among the parties within a short time to clarify the matters in controversy regarding their Tariff 9 claims.

[3] Aetna (complaint filed December 5, 1986), US Sprint (complaint filed January 2, 1987), United Air (complaint filed April 23, 1987), ADP (complaint filed April 22, 1987), Mutual (complaint filed April 24, 1987), Chemical (informal complaint filed April 29, 1987 and superceded by formal complaint filed December 4, 1987), Chase (informal complaint filed March 16, 1987), First Interstate (informal complaint filed March 16, 1987), and Texaco (informal complaint filed July 1, 1987), all seek to recover alleged overcharges paid to AT&T under Tariff 267 between January 1982 and April 27, 1985, the date new DDS rates became effective under Tariff 9. ANR (complaint filed March 2, 1987) seeks damages for the period August 23, 1984 through April 27, 1985; Federal Express (complaint filed March 13, 1987) seeks damages for the period January 12, 1984 through April 27, 1985; and Hartford (complaint filed March 25, 1987) seeks damages for the period April 1, 1984 through April 27, 1985.

[4] Section 415(c) states:

> For recovery of overcharges an action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if a claim for the overcharge has been presented in writing to the carrier within the two-year

period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim or any part or parts thereof, specified in the notice.

[5] The arguments advanced by the various complainants in their replies and oppositions to motions to dismiss are for the most part identical in their essentials. Therefore, we will summarize the complainants' arguments as if they were part of the same pleading. Insofar as individual complainants set forth unique arguments, they are treated individually.

[6] For example, the Tariff 267 claims filed by Chemical and Texaco include a request for damages for periods of time covered in their entirety by the limitations period. Therefore, those claims will be resolved with finality herein.

[7] DDS, a private line digital communications service, entails two-way transmission of digital signals at various speeds, including 2.4, 4.8 and 56 kbps, as well as 1.544 megabits per second (mbps). Tariff 267 specified different rates for each of these rate elements, with the rates increasing as the speed of the service increases.

[8] AT&T, 62 FCC 774, *recon. denied*, 64 FCC 2d 994 (1977), *aff'd sub nom.*, AT&T v. FCC, 602 F.2d 401 (D.C. Cir. 1979).

[9] AT&T, 62 FCC 2d at 778, *citing* Revisions of AT&T Tariff FCC No. 260 Private Line Services, 61 FCC 2d 587 (1976), *recon.*, 64 FCC 2d 971 (1977), *further recon.*, 67 FCC 2d 1441 (1978) (hereafter Docket 18128), *aff'd in part sub nom.* Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). In Docket 18128, the Commission rejected the long run incremental cost (LRIC) methodology proposed by AT&T and determined that each of AT&T's major classes of services should earn the same rate of return within the range prescribed for the company as a whole based on fully allocated historical costs. The Commission further directed AT&T to file revised rate levels for its interstate private line services in accordance with the costing guidelines and methodologies specified in Section XIII of the order. 61 FCC 2d at 668.

[10] The Commission based this alternative on its finding in its Final decision in Docket 20288 that DDS and private line analog data services were like communications services within the meaning of Section 202(a) of the Act. *See* AT&T, 63 FCC 2d 936, 938 (1977).

[11] For example, the intercity mileage rate elements for 2.4, 4.8 and 9.6 kbps were set at levels equal to those in effect for Series 3000 analog private-line channels. However, rates for 56 kbps DDS channels were priced five times the rate for 9.6 kbps channels. *See* AT&T, 63 FCC 2d 936 (1977).

[12] At the time, the lawfulness of AT&T's Tariff 260 MPL rates were under investigation in a separate proceeding. *See* MPL Rate Structure Investigation, CC Docket No. 20814, 59 FCC 2d 428 (1976) (hereafter Docket 20814). The Commission rejected arguments by Telenet Communications Corporation and the Department of Defense that, since AT&T's interim DDS rates were based on the MPL rate structure, they should also be set for investigation. 63 FCC 2d at 938. The Commission found that AT&T had substantially complied with the guidelines set forth in the Docket 20288 decision which had specifically given it the option of basing its interim DDS rates on the Tariff 260 MPL rate structure. Moreover, the Commission noted that the interim rate alternatives were merely guidelines and not a prescription under Section 205 of the Communications Act, 47 U.S.C. § 205. Since the subject revisions reverted to a rate structure already known and in effect for a like communications service within the meaning of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), the Commission viewed the filing as appropriately designed to remove the discrimination between DDS and like analog services.

[13] Specifically, the Commission found that AT&T's filings did not comply with the findings in Docket 20288 because, among other reasons, AT&T had failed to submit the necessary justification for rate differentials between the "like" DDS and analog data services. 67 FCC 2d at 1230. It also found that the filing had failed to comply with the findings in Docket 18128 because it: (1) omitted much of the key justification required to support departures from full cost rates or otherwise support waiver requests from Docket 18128 holdings; (2) failed to provide the cross-elastic effects of DDS rate changes on other services so that the Commission could assess the cost and revenue impact on other Bell services; (3) employed "Basic Service" ratemaking approaches found unlawful in Docket 18128; and (4) removed allocated DDS datum costs without providing the required justification for their removal. *Id.* at 1231.

[14] The requirements of Docket 18128 were waived "temporarily, with respect to the presently effective DDS tariff filing pending further order of the Commission." 67 FCC 2d at 1235.

[15] Letter from D.J. Culkin to Chief, Common Carrier Bureau (Feb. 5, 1979).

[16] The Commission also issued its final decision in Docket 20814 in which it concluded that AT&T's continued use of a "base service" or "residual costing" approach on the allocation of exchange plant costs to its various service categories failed to meet the requirements specified in the Docket 18128 decision. Consequently, the Commission found AT&T's material submitted in support of its MPL rate structure to be unreliable and inadequate to justify the MPL rates. Nevertheless, the Commission allowed the rates to continue in effect pending further Commission action or until cancelled by a subsequent tariff revision. 74 FCC 2d 1, 32-49 (1979), *recon. denied*, 85 FCC 2d 549 (1981), *appeals dismissed sub nom.* Southern Pacific Communications Co. v. FCC, No. 79-2212 (D.C. Cir., June 24, 1981).

[17] Allocation of Common Carrier Costs, CC Docket No. 79-245, 73 FCC 2d 629 (1979).

[18] AT&T Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 74 FCC 2d 226 (1979).

[19] AT&T, 84 FCC 2d 384, 390 (1981), *aff d sub nom.*, MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982) (hereafter *ICAM Order*).

[20] *See* NARUC-FCC Cooperative Committee on Communications, Separations Manual (1971 ed.) incorporated by reference in Section 67.1 of this Commission's Rules, 47 C.F.R. § 67.1. Under the terms of the ICAM, each category was required to earn the system rate of return, and all individual service tariffs were to be supported by adequate cost data. A fourth category, Exchange Facilities for Interstate Access (ENFIA), was also prescribed by the ICAM. *ICAM Order*, 84 FCC 2d at 412.

[21] Telenet and the Department of Defense had previously filed with the Commission petitions for suspension and investigation of AT&T's Tariff 267 rate revisions in the Docket 20288 proceeding. *See* AT&T, 63 FCC 2d 936 (1977). Those petitions, however, were rejected by the Commission. *See, supra*, note 11.

[22] These tariffs, filed to become effective on January 1, 1984, were intended to reflect the Modification of Final Judgment (MFJ) approving the divestiture of the Bell Operating Companies from AT&T and to implement the Commission's access charge orders. *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase II, 57 RR 2d 1511 (1985); *see also*, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[23] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 83-470 (released Oct. 19, 1983), *recon. denied*, FCC 83-568 (released Dec. 29, 1983).

[24] Memorandum Opinion and Order, FCC 84-292 (released Feb. 14, 1985).

[25] AT&T Communications, FCC 85-221 (released May 28, 1985), *recon. denied*, 104 FCC 2d 773 (1986).

[26] GTE Telenet Communications Corp. v. AT&T, Mimeo No. 4755 (released May 29, 1986) (*Telenet Order*). We noted that, because Telenet's complaint was not filed until November 25, 1981, Section 415(c) barred any damage recovery for charges paid prior to November 25, 1979. *Id.* at para. 23 note 35.

[27] GTE Telenet Communications Corp v. AT&T, 1 FCC Rcd 347 (1986).

[28] In addition, several complainants alleged that AT&T's current 56 Kbps rates provided under Tariff 9 are unjust and unreasonable. *See* , *supra*, n.2.

[29] Mutual and United Air make the additional claim that AT&T's failure to pay damages to similarly situated customers as it did Telenet pursuant to the Telenet Settlement Agreement would result in an unreasonable preference or advantage being given to another AT&T customer -- Telenet -- in violation of Section 202(a) of the Act. Mutual and United have not cited, nor have we found, any Commission or judicial precedent that would lend support to such a proposition in the context of a Section 208 complaint proceeding. We see no basis for a finding that the complainants may be unduly prejudiced as a result of AT&T's settlement with another carrier asserting a similar, but independent, cause of action. The Telenet Settlement Agreement in no way affects the complainants' right to damages should they prevail in their own complaint proceedings. Therefore, we must conclude, with respect to this argument, that Mutual and United Air have failed to state a claim under Section 202(a) of the Act.

[30] The complainants concede that it is arguable that they had constructive knowledge of the unlawfulness of AT&T's 56 kbps rates as of November 12, 1985, the date AT&T filed evidence with the Bureau publicly revealing that its 56 kbps DDS rates earned in excess of its authorized rate of return. However, we need not reach that issue here given our conclusions regarding the applicability of the Section 415(c) limiting period.

[31] AT&T states that Telenet's filing of a virtually identical complaint in 1981 underscores that complainants could have alleged their cause of action concerning its 56 kbps rates as early as 1981 and in any event prior to release of the *Telenet Order*.

[32] *See* Tele-Valuation, Inc. v. AT&T, 73 FCC 2d 450 (1979).

[33] *Id.* at 452 *citing* Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385, 390 (1970); *See* Western Mountain Oil, Inc. v. Gulf Oil Corp., 575 F. Supp. 813 (D. Nev. 1983), *aff'd*, 726 F.2d 765 (Temp. Emer. Ct. App. 1983); *See also* Siegel Oil Co. v. Gulf Oil Co., 701 F.2d 149 (Temp. Emer. Ct. App. 1983); Shell Oil Co. v. Nelson Oil Co., 627 F.2d 228 (Temp. Emer. Ct. App. 1980).

[34] In support of this proposition, the complainants' rely on the Commission's decisions in Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket Nos. 82-122 and 78-97, FCC 86-190 (released May 2, 1986), *recon. denied*, FCC 87-161 (released May 21, 1987 (*International Interconnection*), and Western Union Telegraph Co., 102 FCC 2d 485 (1985), *recon. denied*, 1 FCC Rcd 829 (1986) (*Western Union*). This reliance is misplaced. Unlike the DDS rates at issue here, the rates at issue in those proceedings were interim prescribed rates which the Commission later found to be inadequate. In addressing questions regarding the applicability of the Section 415(c) statute of limitations to possible claims for reimbursement and/or retroactive adjustments under Section 208 of the Act, 47 U.S.C. § 208, the Commission indicated that Section 415(c) would not bar claims for reimbursement filed by Western Union outside of the statutory period. The Commission reasoned that until it determined that Western Union did not realize significant cost savings in handling Telex/TWX traffic under the prescribed rates, Western Union had no basis for a claim of reimbursement against its international record carriers. Thus, the facts upon which such a complaint could have been based were inherently unknowable until the Commission issued its decision. In the instant case, those facts were known or should have been known long before the complaints were filed. Nor are we persuaded by the various court and administrative decisions cited by the complainants. The central theme in each of these cases is that claims filed outside the statutory limiting period will be deemed timely where the plaintiff's cause of action is created by judicial or administrative action occurring after the expiration of the statutory period. *See, e.g.*, Neeley & United States, 546 F.2d 1059 (3d Cir. 1976); United States v. One 1961 Red Chevrolet, 45 F.2d 1353 (5th Cir. 1972); Western Union Telegraph Co., *supra*. In the instant case, although the *Telenet Order* may have concerned complainants' cause of action, it certainly did not create that cause of action. It was the underlying rates about which Telenet complained that created the cause of action.

[35] *See* Trans Alaska Pipeline Rate Cases, 461 U.S. 631 (1978). Indeed, in allowing the rates to become effective on an interim basis, the Commission specifically stated that the interim rate alternatives were guidelines and not a prescription under Section 205 of the Act, 47 U.S.C. § 205. AT&T, 63 FCC 2d at 938.

[36] *See* MCI Telecommunications Corp. v. AT&T, 85 FCC 2d 994, 999-1000 (1981), *citing* Arizona Grocery v. Atchison, T.&S.F.R. Co., 284 U.S. 370 (1932). *See also* American Broadcasting Cos., Inc. v. FCC, 662 F.2d 125, 158-59 (D.C. Cir. 1981); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[37] *See, e.g.*, Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385, 389 (1970).

[38] *See* Bunker Ramo Corp., 31 FCC 2d at 454; Thornwell Barnes, 1 FCC 2d at 1252. *See also*, Holmberg v. Armbrecht, 327 U.S. 392 (1946) (the doctrine of fraudulent concealment is an equitable doctrine which is to be read into every federal statute of limitations).

[39] *See* U.S. Cablevision v. New York Telephone Co., 46 FCC 2d 704, 707 (1974), wherein the Commission stated, ". . . we cannot hold that the statute of limitations was tolled in view of complainants' failure to allege any facts whatsoever indicating that fraud or deceit was practiced by [the defendant] upon complainant to prevent complainant from becoming aware of the basic facts upon which its claim for reimbursement is based."

[40] As the court observed in Small v. Signal Gas, Inc., 548 F. Supp. 46 (E.D. MO 1982), "maintaining the legality of ones acts, without more, hardly constitutes the active concealment of wrongdoing." *Id.* at 49. At a minimum, a complainant must allege affirmative acts on the part of the defendant to "hide" the wrongdoing or to misrepresent material facts concerning the wrong. *See, e. g.*, United National Records, Inc. v. MCA, Inc., 609 F. Supp. 33, 36 (D.C. Ill. 1984).

[41] *See, supra*, note 2.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

BAY SPRINGS TELEPHONE CO. File No. 21049-CD-P/L-01-87

For authority to construct facilities) in the Public Mobile Radio Service for Station KNKJ868 to operate on frequency 158.10 MHz at Gulfport, Mississippi

AMERICAN MOBILPHONE PAGING, INC. File No. 22152-CD-P/L-01-87
File No. 22153-CD-P/L-01-87
File No. 22155-CD-P/L-01-87

For authority to construct facilities in the Public Mobile Radio Service for Station KNKI937 to operate on frequency 158.10 MHz at Pascagoula, Mississippi; Biloxi, Mississippi; and Long Beach, Mississippi

## MEMORANDUM OPINION AND ORDER

**Adopted: April 5, 1988; Released: April 13, 1988**

By the Chief, Mobile Services Division:

1. The four captioned applications were announced as apparently mutually exclusive by reason of potential electrical interference. *See* Public Notice, Rpt. No. 87-45, Mimeo No. 4289, released Aug. 5, 1987 at 9 (*August Public Notice)*. On September 3, 1987, American Mobilephone Paging, Inc. (American) filed a Request for Comparative Hearing, pursuant to Section 22.33(c) of the Commission's Rules, requesting that the captioned applications be designated for comparative hearing. Bay Springs Telephone Company, Inc. (Bay Springs) filed an opposition to American's request, and American filed a reply.

## CONTENTIONS OF THE PARTIES

2. American states that it is operating frequency 158.10 MHz base stations at Mobile, Alabama, and Pascagoula, Mississippi; that its three captioned applications seek to increase power of its Pascagoula facility and to add additional frequency 158.10 MHz base stations at Biloxi and Long Beach, Mississippi; and that its proposed Biloxi and Long Beach locations are within 40 miles of American's existing Pascagoula facility. In demonstrating a demand by its existing subscribers for the expanded service, American states that it surveyed its existing frequency 158.10 MHz paging subscribers, and all signed written requests for this expanded service indicating their willingness to subscribe if it were offered. American contends that its proposed service will expand the service area for interstate travelers along the Alabama/Mississippi Gulf Coast area and Interstate-10 through such states whereas Bay Springs' proposed single transmitter would have no other facilities within 40 miles of its proposed location and its service area could not be readily expanded. Consequently, American argues, its proposal is far superior to that of Bay Springs and a comparative hearing would allow American to show the superiority of its proposal.

3. Bay Springs opposes American's request on both procedural and substantive grounds. It states that the Commission had announced much earlier via Public Notice, Rpt. No. PMS-87-40, Mimeo No. 3837, released July 1, 1987 at 9 (*July Public Notice)* that Bay Springs' captioned application was mutually exclusive with American's captioned Long Beach application; thus, it continues, American should have filed its request within 30 days of the *July Public Notice (i.e.,* by August 3, 1987), but since American's request was filed on September 3, 1987, it was untimely filed and should be dismissed. Bay City next contends that American failed to make the required "substantial showing" that would warrant an expensive and time-consuming comparative hearing because American has simply recited that it plans to expand its existing service, that it thinks its proposal is in the public interest, and that it wants to show the superiority of its proposal to the Commission.

## DISCUSSION

4. We conclude that American's request was timely filed. Eight days after release of the *July Public Notice*, American filed a letter with us stating that although the Commission's description therein was accurate, American's captioned Pascogoula and Biloxi applications were also mutually exclusive with Bay Springs' captioned application and, thus, American requested the issuance of a "supplemental, corrective" public notice to so note.[1] As a result, the Commission issued the *August Public Notice*, which we deem to be corrective in nature. American should not be penalized for bringing the omission to our attention and since there is no dispute that American's comparative hearing request was timely filed vis-a-vis the *August Public Notice*, we conclude that such request was timely filed.

5. Lottery selection of a licensee from among mutually exclusive applicants, is the general rule. Section 22.33(c) provides an exception for applicants proposing system expansion. Eligibility to request comparative hearing may be demonstrated by showing that the applicant: (1) is proposing to add one or more transmitter locations to an authorized station on the same frequencies for which it is already licensed and within 40 miles of existing transmitter locations on those frequencies; and (2) the applicant demonstrates a demand by its existing subscribers for expanded service. *See* Section 22.33(c)(1). A comparative hearing is warranted if the applicant demonstrates how the public interest would be served by utilizing the comparative hearing process.

6. We find that American is eligible to request a hearing but has failed to make a compelling showing that the public interest would be served if the Commission used a comparative hearing procedure rather than lottery to determine which of the mutually exclusive applications will be granted. American's mere assertion that all of its subscribers contacted signed written requests for its proposed

expanded service does not persuade us that the public interest would be served by grant of the request for comparative hearing. *See e.g., Ram Communications of Michigan, Inc.*, CC Docket No. 86-195, released June 3, 1986, (*RAM*), where the applicant met the criteria for a comparative hearing by submitting detailed information regarding the number of units involved, the area to be covered and the purpose to be served by the expanded service. In *Speed Call, Inc.*, 2 FCC Rcd 6530 (1987) (*Speed Call*), the applicant requesting a hearing submitted seventeen subscriber survey forms asserting a need for expanded service. There it was held that this was insufficient to satisfy the requirements of Section 22.33. American, unlike the *Speed Call* applicant, did not even submit its asserted surveys and results with its request in an effort to document its claim.

7. Therefore, we deny American's request to designate a comparative hearing. Its applications will be included with Bay Springs' in a lottery which will be announced in a public notice.[2]

8. Accordingly, IT IS HEREBY ORDERED that the Request for Comparative Hearing filed by American Mobilphone Paging, Inc. IS DENIED.

9. IT IS FURTHER ORDERED that a lottery among the captioned applications of Bay Springs Telephone Co. and American Mobilphone Paging, Inc. SHALL BE HELD at a time and place to be specified in a subsequent public notice.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Applications for review may be filed pursuant to Section 1.115(e)(3) of the Rules. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

**FOOTNOTES**

[1] *See* letter to Maria A. Ringold, Operations Branch Chief, from William J. Franklin, counsel for American (July 9, 1987).

[2] Under Section 1.823(b) of the Commission's Rules, petitions to deny filed against applications for authority in the Public Land Mobile Service will not be reviewed prior to conducting the random selection.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-475**

In the Matter of

Amendment of Section 73.504(a), RM-5572
Table of Allotments,
Noncommerfcial Educational FM
Broadcast Stations.
(Las Cruces and Deming, New Mexico)

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 23, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Comission has before it the Petition for Partial Reconsideration filed by The Church of the Crosses, Inc. d/b/a Academy of the Crosses (petitioner) of the *Report and Order*, 2 FCC Rcd 4678 (1987), which, *inter alia*, deleted noncommercial educational Channel 209A from Las Cruces, New Mexico, and substituted Channel 218A therefor, at the request of The Associated Students of New Mexico State University Publications and Communications Board. Petitioner requests the retention of Channel 209A at Las Cruces, stating that it desires to use the channel to provide Las Cruces with additional noncommercial educational service.

2. In support, petitioner states that the Channel 209A and Channel 218A can both be allocated to Las Cruces in compliance with the Commission's technical requirements. It notes that there was no application pending for use of Channel 209A at the time the Commission proposed its deletion. However, petitioner states that it filed an application (BPED-870708MA) for Channel 209A just prior to the adoption of the instant *Report and Order*.

3. At the time the *Report and Order* was adopted in this proceeding, parties desiring to provide noncommercial educational FM service to communities within 320 kilometers (199 miles) of the U.S.-Mexican border, unlike applicants for communities located elsewhere in the United States, were required to specify a channel which was listed in Section 73.504(a) of the Commission's Rules, the Table of Allotments for Noncommercial Educational FM Broadcast Stations. If no vacant channel was available, potential applicants were required to submit a petition for rule making to amend the Table and demonstrate that the channel complied with the mileage separation requirements with regard to Mexican and domestic stations as set forth in Section 73.207(b)(3) of the Commission's Rules.

4. On October 21, 1987, the Commission adopted a *Report and Order* in MM Docket 87-140, 2 FCC Rcd 6754 (1987), eliminating the Table of Allotments for noncommercial educational FM stations in the Mexican border area. The Commission's Rules now allow applicants for such stations to base their spacings to domestic noncommercial educational stations on the contour method, provided they observe the required mileage separations to Mexican allotments as established in the *Agreement Between the United States of America and the United Mexican States Concerning* Frequency Modulation in the 88 to 108 MHz Band, 24 U.S.T. 1815, T.I.A.S. No. 7697 (Mexican Agreement). In light of this action, petitioner is not required to have Channel 209A allocated to Las Cruces in order to pursue its pending application. Therefore, its Petition for Partial Reconsideration will be dismissed as moot.

5. Accordingly, IT IS ORDERED, that the Petition for Partial Reconsideration filed by The Church of the Crosses, Inc. d/b/a Academy of the Crosses IS DISMISSED AS MOOT.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-430**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5310 |
| Table of Allotments, | RM-5687 |
| FM Broadcast Stations. | |
| (Bogue Chitto and Utica[1], | |
| Mississippi) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 24, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 1 FCC Rcd. 680 (1986), issued in response to a petition for rule making filed by Bogue Chitto Broadcasting Company (petitioner). The *Notice* proposed the allotment of FM Channel 225A to Bogue Chitto, Mississippi, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and responded to our request for information concerning the status of Bogue Chitto as a community. However it subsequently filed a request to withdraw its petition. A counterproposal was filed by Chautauqua Broadcasting Company, Inc.[2]

2. Chautauqua Broadcasting Company, Inc. (Chautauqua) counterproposed the allotment of FM Channel 225A to Utica, Mississippi, as that community's first FM broadcast service. Chautauqua indicated its intention to file an application for the channel, if allotted to Utica. Channel 225A can be allocated to Utica consistent with the Commission's spacing requirements provided there is a site restriction 10.5 kilometers (6.5 miles) northeast of the community. [3] The site restriction will prevent a conflict with Station KQID, Channel 226C, Alexandria, Louisiana.

3. In the subsequent comments of Bogue Chitto Broadcasting Company to withdraw its petition to allocate FM Channel 225A to Bogue Chitto, it requested instead that Channel 225A be utilized at Magnolia, Mississippi. At that time, it indicated engineering exhibits were being prepared concerning the use of Channel 225A at Magnolia. However, to date, the engineering exhibits have not been received at the Commission. In any event, a staff study was conducted, using the city reference coordinates for Magnolia, which indicates short spacings to two Mississippi communities with no site restriction available to avoid the conflicts. Therefore, the request for allotment of Channel 225A at Magnolia, Mississippi, is unacceptable and will not be considered.

4. As stated in the *Appendix* to the *Notice*, continuing interest is required before a channel will be allocated. Therefore, in accordance with Commission policy, since the only comments we received in support of the channel at Bogue Chitto have been withdrawn, no further consideration will be given to the allocation of FM Channel 225A at Bogue Chitto, Mississippi.

5. Accordingly, in order to provide a first local service to Utica and pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel no. |
|---|---|
| Utica, Mississippi | 225A |

6. The window period for filing applications will open on **June 1, 1988,** and close on **July 1, 1988.**

7. IT IS FURTHER ORDERED, that the petition of Bogue Chitto Broadcasting Company to allocate Channel 225A to Bogue Chitto, Mississippi IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] This community has been added to the caption.

[2] Public Notice of this counterproposal was given on January 14, 1987, Report No. 1637 (RM-5687).

[3] The coordinates for the restricted site are 32-08-28 and 90-31-06.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-129**

In the Matter of

Amendment of Section 73.202(b), RM-5681
Table of Allotments,
FM Broadcast Stations.
(Marlboro, Vermont)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 24, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of Marrian Akley (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 2806 (1987), proposing the allocation of Channel 268A to Marlboro, Vermont, as that community's first local FM service. In response to the *Notice*, petitioner filed supporting comments stating her intention to apply for the channel.

2. Channel 268A can be allotted to Marlboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.7 kilometers (1.7 miles) northwest of the city.[1] The restriction is necessary in order to avoid short spacings to Station WLKW-FM, Channel 268B, Providence, Rhode Island and Station WRCZ(FM), Channel 269A, Pittsfield, Massachusetts.

3. Since Marlboro is located within 320 kilometers (200 miles) of the common U.S. - Canadian border, concurrence by the Canadian government has been obtained.

4. We believe the public interest can be served by the allotment of Channel 268A to Marlboro, Vermont, as that community's first FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Marlboro, Vermont | 268A |

5. The window period for filing applications will open on **June 1, 1988,** and close on **July 1, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates are 42-53-03 and 72-43-38.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-115**

In the Matter of

Amendment of Section 73.202(b), RM-5538
Table of Allotments,
FM Broadcast Stations.
(Seaside, California)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 23, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 2457 (1987), issued in response to a petition filed on behalf of Dr. H. H. Lusk (petitioner), proposing the allotment of FM Channel 278A to Seaside, California, as that community's second local FM service. Supporting comments were filed by petitioner reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 278A to Seaside since it could provide an additional local FM service to the community.

3. As indicated in the *Notice*, Channel 278A can be allotted to Seaside in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is restricted to an area at least 4.7 kilometers (2.9 miles) southwest[1] of the community to avoid short-spacing to Station KRAY-FM (Channel 280A), Salinas, California.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Seaside, California, as follows:

| City | Channel No. |
|---|---|
| Seaside, California | 278A, 296A[2] |

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 278A at Seaside, California, will open on **June 1, 1988,** and close on **July 1, 1988.**

7. For further information concerning the above proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions pertaining to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Reference coordinates of the restricted site are as follows:

36-34-45, 121-52-05.

[2] A proposal to substitute Channel 296B1 for Channel 296A at Seaside is pending in MM Docket No. 87-566.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-418**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5769 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Sioux Rapids, Iowa) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988; Released: April 13, 1988**

By the Chief, Allocations Branch:

1. At the request of Donald A. Swanson (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6231 (1987), proposing the allocation of Channel 275C2 to Sioux Rapids, Iowa, as the community's first local FM service. Petitioner filed comments reiterating his support for the allotment and intention to apply for the channel, if allocated. Comments were also filed by Sioux Valley Broadcasting Co., Inc. (Sioux Valley), licensee of Station KCHE-FM, Cherokee, Iowa.

2. As stated in the *Notice*, Channel 275C2 can be allocated to Sioux Rapids in compliance with the Commission's minimum distance separation requirements without a site restriction, contingent upon the license of Station KCHE-FM at Cherokee being modified to specify Channel 221A, in lieu of its present 272A, as ordered in Docket 20414, 40 RR 2d 1466 (1977). Sioux Valley, in response to our request for its comments and compliance date for modification of its facilities, states that Station KCHE-FM is now operating on Channel 221A under program test authority and an application for license has been filed (BMLH-870710KA).

3. We believe the public interest would be served by allocating Channel 275C2 to Sioux Rapids, Iowa, since an interest has been expressed in providing the community with its first local FM service. On March 18, 1988, the license of Station KCHE-FM was modified to specified operation on Channel 221A. Therefore, Channel 275C2 can be allocated to Sioux Rapids in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Sioux Rapids, Iowa | 275C2 |

5. The window period for filing applications will open on **June 1, 1988,** and close on **July 1, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for this allotment are: North Latitude 42°, 53', 18"; West Longitude 95°, 08', 54".

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-59**

In the Matter of

Amendment of Section 73.202(b), RM-5535
Table of Allotments,
FM Broadcast Stations.
(Outlook, Montana)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 1956 (1987), proposing the allotment of FM Channel 289C to Outlook, Montana, in response to a petition filed by Timothy D. Martz (petitioner). Petitioner filed comments in support of the *Notice*. No other comments were received.

2. Channel 289C can be allocated to Outlook, Montana, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] Since the allotment of Channel 289C to Outlook is within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to Outlook, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Outlook, Montana | 289C |

5. The window period for filing applications will open on **June 1, 1988,** and close on **July 1, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for this allotment are north latitude 48-53-18 and west longitude 104-46-42.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-323**

In the Matter of

Amendment of Section 73.202(b), RM-5341
Table of Allotments,
FM Broadcast Stations.
(Webb City, Missouri)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988; Released: April 13, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5196 (1987), issued in response to a petition filed by J. R. Communications Company (petitioner), requesting the substitution of FM Channel 230C2 for Channel 232A[1] at Webb City, Missouri, and modification of its license for Station KIKQ, to specify operation on the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 230C2 for Channel 232A at Webb City, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the current license site for Channel 232A.[2]

3. We have authorized in paragraph 5 a modification of petitioner's license for Station KIKQ, Webb City, Missouri, to specify operation on Channel 230C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Webb City, Missouri | 230C2, 236A |

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KIKQ, Webb City, Missouri, IS MODIFIED TO SPECIFY operation on Channel 230C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] KIKQ is licensed to operate on Channel 232A but is currently operating under special temporary authority on Channel 230 with Class A facilities in order to alleviate interference to Stations KSYN and KOBC, Joplin, Missouri.

[2] The coordinates for the current site are 37-14-34 and 94-30-21.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-170**

In re Applications of

OMAHA CHANNEL 54 BROADCASTING GROUP, LIMITED PARTNERSHIP — File No. BPCT-840921LG

OMAHA TELECASTERS, INC. — File No. BPCT-850108KO

For Construction Permit for a New Television Station
Omaha, Nebraska

**ERRATUM**

**Released April 11, 1988**

The *Decision*, FCC 88R-5, released February 25, 1988 is computer garbled and is, therefore, corrected as follows:

Paragraph 4, line 4, change the word " *see* " to "see""

Paragraph 4, line 5, change the word " *is* " to "is""

Paragraph 9, last line, add close quotation marks after the word "cause""

Paragraph 14, line 11, change "proceeding (disqualified" to "proceeding disqualified""

Paragraph 19, lines 37-39, "Home TV, Inc. v. FCC" and "Mid-Ohio" should be italicized."

Footnote 3, last line, add the word "to" between "intent" and "deceive.""

Concurring Statement, line 21, change the word "Acticles" to "Articles""

Concurring Statement, line 27, delete the period after the word "avoidance""

BY DIRECTION OF THE REVIEW BOARD

Allan Sacks
Chief for Law

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-142**

In re Applications of

| | |
|---|---|
| YING HUA BENNS (hereafter Benns) | File No. BPH-850711QP |
| Q PRIME INC. (hereafter Prime) | File No. BPH-850712TI |
| TRANS-CALIFORNIA BROADCASTING COMPANY (hereafter Trans-Cal) | File No. BPH-850712TJ |
| STAR SIGNAL CORPORATION (hereafter Starr) | File No. BPH-850712TK |
| SAN VICENTE COMMUNICATIONS CORPORATION (hereafter Vincente) | File No. BPH-850712TM |
| BUENA VISTA BROADCASTING, LTD., A California Limited Partnership (hereafter Buena Vista) | File No. BPH-850712TN |
| DOUBLEDEE BROADCAST GROUP (hereafter Doubledee) | File No. BPH-850712TP |
| BG COMMUNICATIONS, A Limited Partnership (hereafter BG) | File No. BPH-850712TQ |
| ARMIDA MEDIAN CABELLO (hereafter Cabello) | File No. BPH-850712TR |
| RICHARD S. & SUSAN B. BUSHELL, JOINT VENTURERS (hereafter Bushell) | File No. BPH-850715MV |
| WAYNE R. STAKEY (hereafter Stakey) | File No. BPH-850201MC (PREVIOUSLY DISMISSED) |
| GREENFIELD COMMUNITY BROADCASTING, INC. (hereafter GCB) | File No. BPH-850712TL (PREVIOUSLY DISMISSED) |

For a Construction Permit for
a New FM Station on
Channel 300B (107.9 MHz)
at Greenfield, California.

**HEARING DESIGNATION ORDER**

**Adopted: March 28, 1988; Released: April 14, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Stakey*. Channel 300B at Greenfield, California, was allocated in Docket 83-1063, effective October 12, 1984. Stakey filed his application on February 1, 1985. By *Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19946, published May 13, 1985, the channel was included in the "universal window" that opened June 13, 1985 and closed July 12, 1985. *See Public Notice*, released May 22, 1985. However, Stakey's application was returned on April 25, 1985 as unacceptable for filing because a preliminary study revealed that the proposed site was, *inter alia*, short-spaced to the licensed transmitter sites of KXOA-FM, Sacramento, and Stakey did not request a waiver of 47 C.F.R. § 73.207.[1] On May 23, 1985, Stakey filed a petition for reconsideration of the return of its application.

3. Although Stakey's application was filed prior to the adoption of the *Report and Order*, *supra*, that instituted the "hard look" procedures for the processing of FM broadcast applications, the *Report and Order* made no substantive change in existing policy governing acceptability as defined in 47 C.F.R. § 73,3566(a) which states, in pertinent part, that applications "patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will not be accepted for filing." *See Stevens Point Communications Corporation*, FCC Rcd 1747 (1987); *Twin City Broadcasting, Inc.*, 2 FCC Rcd 7039 (1987); and *Corydon Broadcasters Limited*, FCC Rcd 7521 (1987. As indicated above, Stakey did not request such a waiver. *See Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 521 n.5 (1986). Absent a short spacing waiver request, Commission policy protects existing licensed FM facilities from new proposals being accepted for filing until after program test for modified facilities of existing stations are authorized and/or exercised, *See Stevens Point*, *Twin City* and *Corydon*, *supra*. In its petition for reconsideration, Stakey mistakenly relies on an AM Branch processing policy, pursuant to which AM applications causing interference to licensed AM facilities are initially accepted for filing, although no waiver of the AM interference rule had been requested, if the licensed facility had previously been granted a construction permit to move to an interference-free location. The FM Branch staff adheres to a long-standing practice of requiring waiver requests of the FM spacing rules as a pre-condition to acceptance for filing of any proposals short spaced to a licensed facility, until the licensed station is actually broadcasting from the proposed

non-short spaced site. All applicants for FM broadcast facilities are thus subject to the same requirement. Moreover, the FCC has a rational basis for different processing policies regarding the acceptability/waiver request requirement in the FM radio service as contrasted with the AM service. For many years, because of the much greater demand for FM stations, far fewer AM than FM applications were subject to a processing backlog, making it feasible for the AM staff to keep on file for an indefinite period "contingent" applications which could only be granted if the licensed stations with which they conflicted actually constructed their proposed new facilities. This was not the case in the FM Branch which, because of the far greater demand for FM stations and limited staff resources, has long been awash in a veritable sea of applications and related paperwork. *See North Texas Media, Inc.* 778 F. 2d 28, 34 (D.C. Cir. 1985). Finally, Stakey's claims that his application was inproperly included in the "universal window" must be rejected because his application was properly returned, and the allocation was correctly included in that window pursuant to the *Report and Order*, supra. Accordingly, Starkey's petition for reconsideration will be denied.

4. *GCB.* On July 12, 1985, GCB filed an application which was returned on January 5, 1987 as not sufficient for tender because the effective radiated power (ERP) of the GCB proposed facility was below 25 kilowatts, the minimum value for Class B operation pursuant to 47 C.F.R. § 73.211(a).

5. On February 4, 1987, GCB filed a petition for reconsideration which contends that the equivalent minimum effective radiated power requirements were not required by the application and that Commission Rules provide for a "continuous range of facilities" which start with Class "A" facilities, then Class "B-1", and finally Class "B" with an ultimate equivalent maximum ERP of 50 kW at an antenna height above average terrain (HAAT) of 150 meters (492 feet). On the one hand, GCB argues that station facilities which do not meet the minimum Class "B" requirements would nonetheless be Class "A" or Class "B-1", depending on how far they fall below the minimum Class "B requirements. Conversely, it is argued that equivalent ERP which exceeds the "maximum" for Class "A" would fall into Class "B-1", and that which exceeds the "maximum" for Class "B-1" would become Class "B" facilities. GCB proposed 14.1 kW at 150 meters. Thus, GCB contends that if its equivalent ERP exceeds Class "B-1", it is automatically Class "B".

6. 47 C.F.R. § 73.211(a) clearly states that "Class B Stations must exceed 25 kW." The rule does not depend on equivalent ERP. GCB assumes that a 60 dBu contour is continuously flowing from Class "A" to "B-1" to "B", while the rules, by which the applicants are bound, provide that only the ERP flows continuously from Class "A" to "B-1" to "B". While the 60 dBu contours of different classes do overlap, the 60 dBu contours do not continuously "merge" from class to class. As such, applicant's "merger" argument is irrelevant to meeting the Section 73.211(a) requirement and, accordingly, GCB's petition for reconsideration will be denied.

7. *Bushell.* On November 1, 1985, Q Prime filed a petition for reconsideration of the acceptance for tender of the Bushell application. Q Prime contends, among other things, that the Bushell application was untimely filed and that there were insufficient grounds to support the Commission's waiver of the filing deadline. Bushell filed its Greenfield application on July 15, 1985, accompanied by a request for waiver of the July 12 close of the "window" filing period. In support of its request Bushell set forth unusual and compelling circumstances which include: (a) incorrect information from counsel based on confusion over the actual filing deadline of Friday, July 12, (specified after erroneous release of a *Public Notice* specifying Saturday, July 13, as the closing date which, under 47 C.F.R. § 1.4 of our rules, would have made the filing deadline Monday, July 15; (b) unexpected illness and death in the family which interfered with the preparation of the application; and, most importantly, (c) unanticipated technical disruption of a recognized transmission service which commonly guarantees specialized "on time" delivery. As set forth in detail by the Bushells, the combination of these factors pursuades us that they met the then existing standard with respect to waivers of FCC filing deadlines set forth in *Caldwell Television Associates Ltd.*, 94 FCC 2d 69 (1983), *i.e.*, they exercised reasonable diligence and would have been able to timely file their application but for unforeseeable and unanticipated circumstances beyond their control.[2] Therefore, the Commission's acceptance of the Bushells application for tender was proper and fully consistent with *Caldwell*. Review of the factors considered in the staff determination that the Bushells would have been able to timely file but for unforeseeable and unanticipated circumstances beyond their control fully supports the previous determination that waiver is justified. Accordingly, the Q Prime petition for reconsideration is without merit and will be denied.

8. *Cabello, Star, BG.* Applicants for AM, FM and TV stations have long been required by FCC Forms 301 and 340 to submit a 7.5 minute series U.S. Geological Survey (USGS) Topographic Quadrangle map specifying the proposed antenna and transmitter site to enable staff to verify the stated geographic coordinates of the proposed site, the presence of other nearby communications facilities and/or obstructing terrain. *See* 47 C.F.R. § 73.315. Applicants for FM Station construction permits, unlike applicants for other broadcast services, are required to submit either the entire full scale 7.5 minute map, or a legible photocopy thereof, containing at least two USGS coordinate markings on either side of the marked site placed along the printed margins of both axes. The *Public Notice*, mimeo 3693, released April 5, 1985, stated that applications which failed to comply with one of these alternative requirements would be returned without further review.

9. The above site map requirements were in effect when the "window" closed and during the period for tenderability review of the above applications. However, it appears that the staff inadvertently overlooked the fact that the applications failed to comply with the site map requirements in that the maps do not have USGS coordinate markings in the margins as required by the April 5, 1985 *Public Notice*. Consequently the applications were routinely processed and the applicants were never advised of the defect. By *Memorandum Opinion and Order*, released November 4, 1986, the Commission directed the staff to reinstate *nunc pro tunc* those applications returned for failure to comply with the requirements of the *Public Notice*, so long as the applicants preserved their right of appeal. Since the above applicants had no notice of the tenderability defect, and the applications were never returned, they could not have acted to preserve a right of appeal. Accordingly, Cabello, Star and BG will be re-

quired to submit clarifying amendments which provide the USGS coordinate markings to the site maps within 30 days of the release of this Order.

10. *Buena Vista.* Engineering review of the Buena Vista application reveals that the proposed facilities may pose a radiation hazard to persons located near the base of the antenna tower structure upon which the proposed antenna would be side-mounted.[3] Buena Vista has not complied with 47 C.F.R. § 1.1307(b) of the Commission's revised environmental rules and thus its application is subject to environmental processing. Since its proposal may have a significant impact as defined by 47 C.F.R. § 1.1307, Buena Vista is required to submit an environmental assessment in compliance with 47 C.F.R. § 1.1311. Accordingly, Buena Vista will be required to file an environmental assessment with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

11. *Star, Doubledee, BG.* In response to Section VI, FCC Form 301, Star, Doubledee and BG have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), they are required to submit an Equal Employment Opportunity (EEO) Program which complies with the provisions of that Section of the Commission's Rules as set forth in FCC Form 396A, the five-part Model EEO Program. Paragraph IV of the Guidelines to the Model EEO Program instructs the applicant to specify the recruitment sources that it proposes to use in recruiting minority and women employees. However, these applicants' EEO programs have failed to identify adequate examples of minority organizations, women's organizations, and publications in which they will place employment advertisements. Similarly, Paragraph V of the Guidelines instructs the applicant to specify the nature of the training assistance it will provide to students, schools or colleges in programs to help minorities and women. These applicants' programs fail to state with particularity the nature of such training assistance. Accordingly, Star, Doubledee and BG shall amend their applications by submitting to the Administrative Law Judge specific sources of recruitment and details regarding training assistance.

12. *Other matters.* BG petitioned for leave to amend its application on August 25, 1987. The amendment was filed after the last date for filing amendments as of right. Under § 1.65, the BG amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

13. *Freedom Channel.* By *Report and Order* adopted March 19, 1987 (MM Docket No. 86-100), the Commission approved the substitution of Channel 298A for vacant Channel 240A at Freedom, California. However, the substitution renders Channel 298A short-spaced to nine of the pending Greenfield applicants. This impact was not known when the Notice of Proposed Rule Making in MM Docket No. 86-100 was adopted. At that time, the Greenfield applications had just been received for filing and had not yet been accepted and made a part of the Commission's records. The Notice was based on compliance with the minimum distance separation requirements between the proposed Freedom substitution channel and the reference coordinates of the Greenfield channel. *See* 47 C.F.R. § 73.208; paragraph 21 of the *Report and Order*. In view of the above, all applicants, with the exception of Cabello, will be afforded an opportunity to specify a non-conflicting transmitter site. This may be accomplished in each instance without loss of mutually exclusive status since no upgrade in class of channel will result. No comparative advantage will be allowed.

14. Data submitted by the applicants indicates that there would be significant differences in the size of the areas and populations which would receive service from each of the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Buena Vista in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-.1319 of the Commission's Rules.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the petition for reconsideration and supplements to that petition filed by Stakey are DENIED.

18. IT IS FURTHER ORDERED, That the petition for reconsideration filed by GCB is DENIED and its application is RETURNED.

19. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Q Prime is DENIED.

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed by BG is GRANTED, and the corresponding amendment ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That Cabello, Starr and BG shall file amendments in accordance with Paragraph 10 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That Buena Vista shall file an environmental amendment with the Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That Star, Doubledee and BG submit to the presiding Administrative Law Judge Section VI information in accordance with Section 73.2080(c) of the Commission's Rules and paragraph 12, *supra*, within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That the following applicants may file amendments in accordance with Paragraph 14 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order: Benns, Prime, Trans-Cal, Staff, Vincente, Buena Vista, Doubledee, BG, Bushell.

25. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 5, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**APPENDIX**

(a) Pursuant to granted construction permits (BPH-8814 and BPH-831216AA), KSOL-FM has not been using its licensed site but has been operating for many space

(b) pursuant to granted construction permits (BPH-821217AF and BPH-850204ID), KXOA-FM has been authorized but not yet convienced operating from a transmitter site that is also not short-spaced to Stakey's proposed site and

(c) the "universal practice" of the Commission's AM processing line has been to accept for filing "an application where there is no interference with operation of existing station, authorized in an outstanding construction permit, even though there may be interference with the station's licensed operation . . . (and) with hold action on an application and grant the application after the existing station changes it's transmitter site or frequency to the non-conflicting facilities specified in its construction permit." Stakey argues "a similiar policy should be followed in FM," and

(d) stakey's application should not be included in the "universal window," but issued a special cut-off list because it was returned by mistake.

**FOOTNOTES**

[1] The April 25, 1985 return letter afforded Stakey an opportunity to obtain reacceptance by submitting a corrected application within 30 days.

Pusuant to a *Public Notice*, entitled "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, 49 Fed. Reg. 47331 (1984), *recon. denied* 57 RR2d 1603 (1985):

> FM applications must comply with distance separation standards as well as the maximum power and antenna height limitations. If an aplication does not comply with these requirements, and does not contain an appropriate request for waiver, the application will be returned.
>
> . . . [W]e have. . .granted reconsideration of an action dismissing or returning an application as unacceptable for filing when an applicant submits a relatively minor curative amendment within 30 days. In contested proceedings the result of this procedure is that applications are accepted *nunc pro tunc*.

Stakey's application, as filed on February, 1985, was subject to the foregoing procedures. However, it did not contain a waiver request, and the petition for reconsideration did not contain an amendment to cure the deficency.

[2] *Caldwell* was subsequently overruled by the Commission. *Public Notice*, "FCC Overrules *Caldwell Television Associates Ltd.*," FCC 85-534, October 4, 1985.

[3] Our studies indicate that Buena Vista's antenna would radiate 100 kW ERP at 51 meters above ground level.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-150**

In re Applications of

| | |
|---|---|
| RADIO INDIO CORPORATION (hereafter RIC) | File No. BPH-851030MK |
| TY STEVENS BROADCASTING LIMITED (hereafter Stevens) | File No. BPH-851030MV |
| M. CHRISTINE OTTINGER (hereafter Ottinger) | File No. BPH-851025ML (PREVIOUSLY DISMISSED) |
| RONALD PAYNE (hereafter Payne) | File No. BPH-851029MY (PREVIOUSLY DISMISSED) |

For Construction Permit
for a New FM Station
on Channel 272A (102.3 MHz)
Indio, California

**HEARING DESIGNATION ORDER**

**Adopted: March 30, 1988; Released: April 14, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* The applications of Ottinger and Payne were found to be untenderable and were returned on November 14, 1985 by action of the Chief, FM Branch. Public notice of this return was released on November 22, 1985. Thereafter, Ottinger and Payne filed petitions for reconsideration of this action on January 21, 1986 and January 2, 1986, respectively.

3. 47 U.S.C. § 405 specifies that a petition for reconsideration must be filed within 30 days from the date upon which public notice is given of the specified action. As this mandate is statutory, no extension of time may be granted. Consequently, because the 30-day period for filing a petition pursuant to 47 C.F.R. § 1.106(f) closed on December 27, 1985, the petitions filed by Ottinger and Payne on January 21, 1986 and January 2, 1986 were untimely. Accordingly, the petitions for reconsideration filed by Ottinger and Payne will be dismissed.

4. Stevens proposes to mount its antenna on the existing 120' tower presently licensed to KRCK (formerly KCHV) under license BLH-861006KF. RIC proposes to construct a new 53' tower immediately adjacent to the KRCK tower. Review indicates that each of these proposals would not be in compliance with the ANSI radiofrequency radiation limits as set forth in the Commission's *Report and Order* in GEN. Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Specifically, although each proposal complies with the ANSI limit when considered alone, the ANSI limit is exceeded when the effects of other nearby facilities (including KRCK) are considered. Inclusion of these facilities in an RF analysis is necessary to permit a determination to be made as to whether or not a proposal would have a significant effect under the criteria set out in 47 C.F.R. § 1.1307. If the applications are subject to environmental processing under § 1.1307(b) criteria, the applicants must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operations would cause exposure to workers or the general public to levels of radiofrequency radiation exceeding specified standards. Since these proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, both applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Nearby sources of RF radiation must be included in this study. Accordingly, the applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 70 FCC 2d 239 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

| APPLICANT | DATE AMENDMENT FILED |
|---|---|
| Stevens | February 25, 1988 |

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to RIC and Stevens in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 3 hereinabove, pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106(f), the petitions for reconsideration filed by Ottinger and Payne ARE DISMISSED.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Stevens and RIC shall submit the environmental assessment required by Section 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Stevens.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **May 5, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CRESCOMM TRANSMISSION SERVICES INC. File No. I-T-C-88-060

Application for authority to establish channels of communication between the U.S. and INTELSAT Atlantic satellites for provision of INTELSAT Business Services and International Television Service

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: April 6, 1988; Released: April 14, 1988**

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application filed on December 16, 1987, and amended on February 25, 1988, by Crescomm Transmission Services Inc. (Crescomm) requesting authority, pursuant to Section 214 of the Communications Act of 1934, to establish and operate channels of communications between the U.S. and overseas points for the provision of INTELSAT Business Services (IBS) and International Television Service. Crescomm requests authority to utilize Atlantic satellites only. The applicant states it wishes to use existing earth stations or construct new earth stations for which authority will be sought pursuant to Title III of the Communications Act. The application was placed on public notice on January 13, 1988. No comments were received.

2. The applicant requests the same blanket authority to provide IBS services and international television services as we have granted to other carriers.[1] A grant of blanket authority here would be consistent with the action that we took in those decisions and in the public interest. Crescomm is a licensee in the domestic satellite and microwave services and has the requisite qualifications to provide IBS and international television services to overseas points where suh services have been introduced.

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision by Crescomm of the IBS and television space segment between earth stations that are now or may be licensed to it in the future and appropriate INTELSAT Atlantic satellites.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-060 IS GRANTED, and Crescomm is authorized to establish channels of communication between U.S. earth stations and appropriate INTELSAT Atlantic satellites for the provision of IBS and related digital video services and International Television Service between the U.S. and those countries that are now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS international or television service. Provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS earth station Title III applications that the applicant may filed in the future.

5. The Section 214 authorization granted herein is effective on its release of this order and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondent and copies of the agreements shall be filed with the Commission within 30 days of its execution.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTE**

[1] For IBS services, see Vitalink International Communications, Inc., Mimeo No. 687 (released November 7, 1984). *See* also, Communications Satellite Corporation, Mimeo No. 6564 (released September 14, 1984), and American Telephone and Telegraph Co., *et al.*, (File Nos. I-T-C-85-035, *et* al.), Mimeo No. 3220 (released March 18, 1985) for international television services, see AT&T et al., 18 FCC 2d 402 (1969), and ITTWC et al., 76 FCC 2d 26 (1980).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-151**

In re Applications of

| | |
|---|---|
| BAYBORO BROADCASTING (Hereafter Cowan) | File No. BPH-860916MA |
| THERESA SCHREIBER (Hereafter Schreiber) | File No. BPH-860918MU |
| THOMAS H. CAMPBELL (Hereafter Campbell) | File No. BPH-860918MX |
| TERRY FREITAG (Hereafter Freitag) | File No. BPH-860918OK |
| James E. Hodges & Lewis V. Parrish d/b/a THE BAYBORO COMPANY (Hereafter Company) | File No. BPH-860918MG (DISMISSED HEREIN) |

For a Construction Permit
For a New FM Station
on Channel 250A in
Bayboro, North Carolina

**HEARING DESIGNATION ORDER**

**Adopted: March 30, 1988; Released: April 14, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* Engineering study reveals that Company's application lists inconsistent values for the antenna height above average terrain (HAAT). The average height above mean sea level (AMSL) of all eight radials is listed as 4.5 meters in Figure 4 of Company's application. Company's tower sketch at Figure 3 indicates that the ground height above mean sea level is 8 meters. Company also shows its antenna to be 100 meters above ground level (AGL) in the tower sketch. When the average height above mean sea level of the radials, 4.5 meters, is subtracted from the 108 meter height for the antenna radiation center above mean sea level, this results in an HAAT of 103.5 meters, which is in excess of the 3 kW/100 meter HAAT maximum permitted for a Class A station under 47 C.F.R. § 73.211(b). However, Company lists an HAAT of 100 meters in Section V-B, Item 6, of its application, in compliance with 47 C.F.R. § 73.211(b).

3. The discrepancy in the values listed for the HAAT renders it impossible to determine whether the facilities proposed are in compliance with 47 C.F.R. § 73.211(b)(2). Furthermore, no waiver of that section was requested, nor was a corrective amendment submitted during the 30-day period for filing amendments as of right accorded applicants pursuant to the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). The *Report and Order* also noted that "[t]o permit curative amendments after that [30 day] period poses too great a threat to the orderly functioning of our new processing procedures." Therefore, to permit the applicant to clarify and resolve this problem well after the amendment period has passed would force the staff to temporize with a flawed proposal, thus disserving the public and other applicants having timely amended and perfected applications on file by delaying significantly the initiation of new service. *See Key Broadcasting Corp.*, 2 FCC Rcd 3887 (1987)(Hearing Designation Order). *See also Hillebrand Broadcasting, Inc.*, 2 FCC Rcd 419 (1986); *Joanne Brehm*, 2 FCC Rcd 403 (1986). Accordingly, Company's application must be dismissed.

4. *Other matters.* Cowan indicated in Section V-B, Item 9 of its application that the overall height above ground of its tower, *excluding* obstruction lighting, was 99.1 meters. Elsewhere in the application, at Section V-G, Item 5, Cowan indicated that the overall height above ground of its tower, *including* obstruction lighting, was 99.1 meters. The discrepancy arising from Cowan's listing of the tower's overall height above ground with and without obstruction lighting as being equal does not render the application unacceptable in the instant case. The correct value for the overall height above ground of the tower, 98.1 meters (excluding obstruction lighting), can be derived by subtracting the value of the site elevation above mean sea level listed in Exhibit 3, 7.6 meters, from the overall tower height above mean sea level excluding obstruction lighting, 105.7 meters. The value obtained by performing this computation, 98.1 meters, is consistent with that given in Exhibit 3. However, pursuant to 47 C.F.R. § 73.3522, Cowan will be required to amend its application by submitting corrective data to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, each applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

| APPLICANT | DEFICIENCY |
|---|---|
| Campbell | Failed to identify specific publications which will be utilized to attract women and minority candidates. |

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determin- ing whether a comparative preference should accrue to any of the applicants.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT: Freitag.

8. Except as may be indicated by any issue specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Freitag

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 2-3 hereinabove, the application of Company IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 73.3522, Cowan shall submit an amendment in accordance with paragraph 4 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge: Campbell.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c) in person or by attorney, within 20 days of the mailing of this Order, not later than **May 5, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-162**

In re Applications of

MEDIA INVESTMENT CORP — File No. BPCT-870326KL

WADE AXELL — File No. BPCT-870327KK

For Construction Permit
Merced, California

**HEARING DESIGNATION ORDER**

**Adopted: March 30, 1988; Released: April 14, 1988**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 51, Merced, California.

2. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. Wade Axell has not submitted such an exhibit. Accordingly, Mr. Axell must submit and amendment which contains the requisite exhibit to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Section II, item 3(a), FCC Form 301, inquires whether the applicant is in compliance with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. Media's response indicates that it may not be in compliance with Section 310 of the Act. Media will be required to submit clarification of its response to the presiding Administrative Law Judge within 30 days after this order is released.

4. Section II, item 10, FCC Form 301, inquires whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provides that (a) voting rights will remain with the applicant even in the event of default on the obligation; (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission (pursuant to 47 U.S.C. 310(d)) will be obtained. A negative response to this question must be accompanied by an explanation. Media gave a negative answer to Question 10, but did not include the required exhibit. Accordingly, Media will be required to file an amendment explaining the negative response to Question 10, Section II, FCC Form 301, with the presiding Administrative Law Judge within 30 days after the release of this Order.

5. The coverage areas proposed to be served by the applicants differ significantly. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

7. From our review of the proposal submitted by Media, we cannot determine whether the applicant is in compliance with the revised environmental rules set forth in the Report and Order in General Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the revised rules, an applicant must determine whether the radiation hazard of its proposals would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to environmental processing under the Section 1.1307 criteria, the applicant must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission's Rules. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of Media's application suggests that it has not followed the procedures outlined above. While it is unlikely that an RF problem exists as a result of the height and power proposed by Media, other factors must be evaluated by the applicant in making a final determination. The applicant will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have an adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will then proceed regarding this matter in accordance with the provisions of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, a contingent environmental issue will be specified, and the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.* 83 FCC 2d 337 (1980).

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Media Investment Corp, in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That Wade Axell shall submit an amendment which contains the exhibit required by Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

11. IT IS FURTHER ORDERED, That Media Investment Corp shall submit a statement clarifying its response to Section II, item 3(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

12. IT IS FURTHER ORDERED, That Media Investment Corp shall submit an appropriate amendment explaining its negative answer to Question 10, Section II, FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That Media Investment Corp shall submit an amendment which contains an environmental statement as explained in paragraph 6, above, to the presiding Administrative Law Judge and a copy to each the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

15. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 14, 1988

## SOUTHERN NEW ENGLAND TELEPONE CO. FILES FINAL EQUAL ACCESS CONVERSION REPORT

Pursuant to the Commission's April 22, 1987, Order regarding implementation of equal access by the Southern New England Telephone Co. (SNET) (FCC 87-128), SNET filed its final equal access quarterly status report on March 31, 1988. SNET's first quarterly report was filed on June 30, 1987 (*see* PN, DA87-884, released July 15, 1987), its second quarterly report on September 30, 1987 (*see* PN, DA87-1473, released October 19, 1987), and its third quarterly report on December 31, 1987 (*see* PN, DA88-3, released January 13, 1988). In its April 22, 1987, Order, the Commission had required SNET to comply with its proposed expedited conversion schedule. That schedule provided for the conversion of 23% of SNET's stored-program-controlled (SPC) lines by April 27, 1987; 49% by October 27, 1987; 83% by December 31, 1987; and 100% by March 31, 1988. According to its Final Equal Access Conversion Report, SNET has completed the conversion schedule prescribed in the April 22, 1987, Order. SNET indicates that it had converted 1,312,700 SPC lines as of March 31, 1988, which represents an increase of 10,400 lines over the originally scheduled total.

The SNET final quarterly report is available for reference in Room 537, Industry and Analysis Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554

For further information, contact Arthur David, (202) 632-0745, or Diane Cornell, (202) 632-9342, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-363**

In re Applications of

MARTIN INTERMART, INC.
Las Vegas, Nevada — File No. BPH-821020AP

GARY E. WILLSON
Paradise, Nevada — File No. BPH-821021AI

FREMONT BROADCASTING CORPORATION
Las Vegas, Nevada — File No. BPH-821021AP

For Construction Permit for a New FM Broadcast Station

**ERRATUM**

**Released: April 14, 1988**

The corrected copy of the Review Board *Decision*, FCC 88R-16, released March 22, 1988, is computer-garbled and is corrected as follows:

Paragraph 5, line 3 - change ""B cut-off" to ""B" cut-off"

"line 37- change "to e blunt" to "to be blunt"

"line 49-change ""Blindman's "B[l]uff"." to ""Blindman's B[l]uff.""

Paragraph 6, line 3 - change ""AM-daytime preference policy." to ""AM-daytime preference policy.""

Paragraph 6, last line of quotation - change ""substantial." to ""substantial.""

Paragraph 7, line 25 - insert "2" before "FCC Rcd"

" line 34 - change "differences." to "differences.""

" lines 36-7 - italicize the case name "Van Buren Community Service Broadcasting, Inc."

" lines 49-50 - italicize the case name "Gilbert Group, Inc."

" line 51 - change ""integration preference" to ""integration preference""

Footnote 1, line 10 - italicize the case name "Women's Broadcasting Coalition"

" line 13 - change "v iz." to "*viz.*"

" line 16 - italicize "aff'd"

" line 27 - change ""integration" to ""integration""

" line 34 - italicize "Gary W. Willson" and "Order"

" line 38 - change ""integration" to ""integration""

Footnote 3, lines 11-12 - "formulation" should not be italicized

By Direction of the Review Board

Leland J. Blair
Acting Chief For Law

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-67**

In the Matter of

Policy for the Distribution of
United States International Carrier
Circuits Among Available Facilities
During the Post-1988 Period

**REPORT AND ORDER**

**Adopted: March 24, 1988; Released: April 14, 1988**

By the Commission:

## I. INTRODUCTION

1. This proceeding was initiated to develop policy for distribution of United States international carrier circuits among available facilities in the various regions of the world during the post-1988 period. Current circuit distribution guidelines for the Atlantic Ocean Region (AOR) will expire at year-end 1988[1] and guidelines for the Pacific Ocean Region (POR) will expire at year-end 1991.[2]

2. We released a Notice of Proposed Rule Making (NPRM) on April 10, 1987, in which we tentatively concluded that we should develop a circuit distribution policy for the post-1988 period on a worldwide rather than a region-by-region basis.[3] We also tentatively concluded that we should continue to exempt from circuit distribution guidelines all circuits used by all United States international service carriers for any services, except for those circuits used by American Telephone and Telegraph Company (AT&T) for the provision of international message telephone service (IMTS) and 800 service-overseas. However, we reached no tentative conclusion concerning the post-1988 circuit distribution policy which should be applied to such AT&T circuits but, rather, requested comments on three policy options for such circuits. We also invited parties to submit any other circuit distribution policies for the post-1988 period they wish us to consider. Finally, we requested AT&T and the Communications Satellite Corporation (Comsat) to provide certain information required by the parties and FCC to analyze certain aspects of the circuit distribution policy options under consideration.

3. The common theme of the three policy options that we proposed with respect to AT&T's IMTS and 800 service-overseas circuits was a movement away from the imposition of circuit distribution guidelines.Under the first option, the Commission would remove itself from decisions regarding the distribution of all circuits, including AT&T's international message telephone and 800 service-overseas circuits, at year-end 1988. This would allow all U.S. carriers, including AT&T, total freedom to determine with their overseas correspondents, how all circuits should be distributed among available facilities. The second option is one which would continue the current process of phasing in increased flexibility for AT&T in its circuit distribution decisions and, concomitantly, phasing out Commission involvement in those decisions.[4] The third option would phase-out Commission involvement in circuit distribution decisions over a period related to the period of time during which INTELSAT will use space segment in which its investment is currently committed or "sunk".[5]

4. We received comments from AT&T, Comsat, National Telecommunications and Information Administration (NTIA),[6] Department of Defense (DoD), MCI International, Inc. (MCII), ITT World Communications Inc. (ITT), RCA Global Communications, Inc. jointly with RCA American Communications, Inc. (RCA), U.S. Sprint Communications Company (US Sprint), Overseas Telecommunications, Inc. (OTI), Pan American Satellite (PAS), Institute of Electrical and Electronic Engineers, Inc. (IEEE) and Anthony M. Rutkowski. Reply comments were submitted by AT&T, Comsat, NTIA, MCII, RCA, U.S. Sprint, OTI, PAS, IEEE, M/A-COM Telecommunications, Inc. (M/A-COM)[7] and the Department of State. Additionally, AT&T and Comsat separately filed the information that we requested in the NPRM.

5. On October 9, 1987, Comsat and AT&T submitted joint supplemental comments in the proceeding. The joint supplemental comments presented the Commission with an agreement between Comsat and AT&T which the two parties said established (1) a set of commitments relating to AT&T's worldwide use of Comsat's INTELSAT space segment capacity for IMTS circuits activated through 1994, and (2) a framework for discussions and exchanges of information that will provide a basis for AT&T's further use of Comsat's INTELSAT space segment capacity after 1994. Comsat and AT&T intend the agreement as a replacement for Commission imposed circuit distribution guidelines. They request the Commission to find that the agreement is consistent with the public interest and to rely upon it as a basis for withdrawing all circuit distribution guidelines affecting the distribution of AT&T's IMTS circuits.

6. By public notice issued on October 15, 1987, the Common Carrier Bureau requested comments and replies on the Comsat/AT&T agreement.[8] Comments were filed by Fedex International Transmission Corporation (Fedex), MCII, NTIA, PAS and US Sprint. Reply comments were jointly filed by Comsat and AT&T and also by Fedex and PAS.

7. By Transmittal No. 674 filed on November 20, 1987, Comsat proposed tariff revisions based in large part on provisions of the AT&T/Comsat agreement. A number of petitions and comments were filed in response to the tariff. Subsequently, PAS filed a motion to consolidate this proceeding with consideration of Comsat's tariff proposals. Comsat filed an opposition to PAS's motion. By order released on February 17, 1988, the Chief, Common Carrier Bureau permitted the tariff to go into effect subject to certain modifications and denied PAS's motion to consolidate.[9]

8. In this Report and Order, we find that the public interest will be served by ending all circuit distribution guidelines at this time. We conclude that, subject to certain modifications, the Comsat/AT&T agreement provides a basis for taking this action. However, we will monitor and retain jurisdiction to take any necessary action with respect to AT&T's future facility choices to assure (1)

continued fulfillment of the objectives of the Communications Satellite Act of 1962, and (2) successful development of competition in international communications.

## II. RESPONSE TO THE NPRM

9. Our tentative conclusion in the NPRM to continue exemption from circuit distribution guidelines of all U.S. carriers except AT&T received support from those parties which commented on the proposal. ITT, RCA, and US Sprint specifically supported the proposal; no party suggested that the Commission apply circuit distribution guidelines to any U.S. carrier other than AT&T. The bulk of the comments that we received were directed toward the policy options that we posed with respect to AT&T's IMTS and 800 service-overseas and toward our proposal to develop worldwide rather than a region-by-region circuit distribution policy.

10. In comments filed before they reached their agreement, AT&T and Comsat took divergent views on what Commission policy should be concerning the distribution of AT&T circuits. AT&T urged that no circuit distribution guidelines should be imposed in any region after 1988 and accordingly supported the Commission's first policy option to remove itself from all circuit distribution decisions at the year-end 1988. AT&T contended that the Commission's circuit distribution policies have served their purpose in assuring the substantial use of the INTELSAT system and that continuation of those policies is unnecessary and would undercut the development of competition in international facilities and services. It submitted that the elimination of circuit distribution guidelines would not lead to sudden, drastic shifts of AT&T circuits from satellite to cable facilities. AT&T stated that it would continue to make substantial use of INTELSAT for the remainder of the century.

11. Comsat, on the other hand, maintained that the Commission should continue imposing circuit distribution guidelines on AT&T beyond 1988 and that no firm date for their expiration be established at this time. Comsat proposed that the Commission adopt and bind AT&T to the circuit distribution plan that AT&T submitted in its comments and monitor the implementation of that plan to ensure that the relative cable/satellite traffic shares (as opposed to absolute numbers of circuits) remain consistent with those reflected in the plan, in the event of a shortfall of traffic. Comsat believes that the continued economic well-being of the INTELSAT system and the ability of U.S. service carriers to compete is dependent on the continued imposition of circuit distribution guidelines on AT&T. Comsat's primary concern is AT&T's continued dominance in the provision of IMTS and in the total use of facilities. Comsat believes that the market is not yet competitive enough to assure that AT&T loading decisions are made on the basis of facility price and availability rather than other factors. Comsat is concerned that, absent restraints on AT&T, a large part of its traffic and revenue base could be lost and that, in view of the large "sunk" investment in the INTELSAT VI program, users would face sharp rate increases.

12. The three government agencies which filed comments in response to the NPRM all supported the eventual elimination of circuit distribution guidelines under certain conditions. NTIA supported the Commission's goal to create a viable international market in which users and carriers make facilities use decisions with as little regulatory interference as possible. It stated that the Commission should announce its determination to end the direct regulation of loading, but provide for a transition period for adjustment by INTELSAT and Comsat to permit negotiations between Comsat and AT&T. Similarly, the Department of State saw no persuasive evidence that there would be a massive migration to underseas facilities if circuit distribution requirements are removed. It believes that both satellites and cables have reached levels of institutional maturity that obviate a continuing need for artificially enforced circuit distribution over the long term. State supports a phase-out of current regulations over a three to five year period. State believes that, whatever period is selected, it is important to give INTELSAT and facilities providers a clear, non-ambiguous message so that they can develop long range plans involving major capital expenditures with a reasonable degree of certainty. Finally, DoD indicated that the proposals to remove the Commission from circuit distribution decisions do not raise national defense and security considerations. However, DoD urged the Commission to condition its adoption of any proposal to phase out circuit distribution plans on the continued absence of identifiable probable harm to the national defense and security.

13. Several carriers urged a cautious approach in granting AT&T additional flexibility in making circuit loading decisions. They are concerned that any precipitous abandonment of circuit distribution guidelines would: (1) cause a shortage of cable facilities available to these carriers because of immediate and substantial increased AT&T use of cables; (2) increase space segment rates and impair the ability of smaller carriers to compete as AT&T use of satellite facilities decreases precipitously; and (3) introduce unpredictability in overall facilities availability and disrupt planning by carriers. These parties contend that any relaxation of circuit distribution guidelines should be done gradually over a planned transitional period that would provide reasonable certainty with respect to facility price and availability. Thus, MCII stated that the Commission's option to permit AT&T 100 percent flexibility after 12 years is reasonable and should effectively serve the public interest. OTI stated that the Commission's second policy option, phasing out Commission involvement in AT&T IMTS and 800 service-overseas circuit distribution decisions, would certainly be preferrable to the first option, particularly if the Commission adopted a phase-out period of 10 to 12 years. OTI urged the Commission to consider retaining the restriction against AT&T's deloading of either cable or satellite facilities. It also found adoption of the Commission's third policy option to be reasonable if the Commission adopts a phase-out period of 10 to 12 years and maintains prohibitions on circuit deloading. ITT asserted that the Commission should continue its current North Atlantic circuit distribution policy of permitting AT&T to increase two percent per year the number of circuits it places on either cable or satellite facilities. It urged the Commission to retain the four percent per year increase in AT&T's circuit distribution decision flexibility in the Pacific Ocean region. It also urged the Commission to retain the current deloading restriction in both regions. It asked the Commission to establish a 70 percent cap on AT&T's use of a single medium. Finally, US Sprint urged the Commission to adopt the second post-1988 policy under which AT&T's flexibility in making its international switched voice circuit loading decisions would be increased by equal percentages on an annual basis over a period of years. US Sprint further urged the Commission

to specify a transition period of seven years which would result in AT&T achieving 100 percent flexibility in its IMTS and 800 service-overseas circuit distribution decisions at year-end 1995.

14. RCA and PAS both requested the Commission to consider other factors in considering whether to continue imposing circuit distribution guidelines. RCA complains that INTELSAT has raised improper technical objections to U.S. satellites in transborder service consultations under Article XIV(c) and (d) under the INTELSAT Agreement and in International Frequency Registration Board (IFRB) coordination procedures. RCA states that INTELSAT should not be guarenteed a substantial share of IMTS traffic through U.S. circuit distribution policy while it continues its conduct and effectively denies U.S. transborder service providers an opportunity to compete. PAS complains that INTELSAT has engaged in certain pricing practices which it believes are predatory and intended to destroy satellite competition. PAS urges the Commission to expand the focus of this proceeding to considering the future viability of international satellite technology in general rather than just INTELSAT's viability. Accordingly, PAS argues that the Commission should allocate IMTS traffic not only to INTELSAT but to international separate satellite systems which are attempting to compete with INTELSAT.[10] However, if the Commission is unwilling to consider this option, PAS urges the Commission to adopt the first of the policy options set forth in the NPRM, removal of restrictions on AT&T's distribution of IMTS circuits at year-end 1988.

15. Anthony M. Rutkowski stated that the Commission should withdraw from the circuit distribution process as soon as possible. Mr. Rutkowski states that cable and satellite circuits can no longer be considered equivalent or fungible because optical fiber is clearly the medium of choice for high-capacity, non-mobile terrestrial traffic. Further, he states that a configuration that provides backup for critical communications through multiple, geographically dispersed cables and dynamic network architectures would be more robust and less costly than one that relies on satellites. Similarly, the IEEE noted the ongoing rapid development in switching and associated technologies. It asserts that in an increasingly competitive global environment, the U.S. carriers should be leading the world community in implementing these strategic technologies free from regulatory measures designed for another era. The IEEE urged the Commission to consider technological and architectural factors such as fast packet, fast circuit, and hybrid switching and transmission technologies, repeaterless flouride glass cables and fully photonic network in making a decision in this proceeding. It further asserted that, in the situation it describes, minimal regulation will encourage technological innovation and its ensuing economic gain. However, M/A-COM claimed that IEEE ignores the advantages of satellites and states that satellites can be fully compatible with fast switching technology. M/A-COM contends that all three of the Commission's circuit distribution policy options are unacceptable. M/A-COM believes that AT&T's economic and regulatory incentives are prejudiced against use of satellites because of its ownership of cables. It concludes that the Commission must continue to have a significant role in circuit distribution decisions in order to preserve the economic viability of the global satellite network.

## III. THE COMSAT/AT&T AGREEMENT

### A. Basic Provisions

16. The Comsat/AT&T agreement requires AT&T to maintain on INTELSAT a year-end 1987 base level of 20,099 voice-grade satellite circuits and place on INTELSAT at least a stipulated percentage of its global IMTS growth traffic during each calendar year from 1988 through 1994 as shown below:

| 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 |
|---|---|---|---|---|---|---|
| 55% | 20% | 45% | 35% | 30% | 30% | 30% |

The percentage averages 34% over the seven-year period. Also, AT&T may activate additional satellite circuits during the period if necessary to meet its needs. Comsat is required by the agreement to submit to the Commission a 10-year tariff governing the provision of digital bearer circuits employing IDR and TDMA/DNI technology. These bearer circuits are to be offered at globally averaged prices of $875 per month through 1992, and these prices will decline to $825 per month in 1993 and $800 per month in 1994. The parties state that other terms and conditions contained in this tariff will be comparable to those in COMSAT's current nine-year FM tariff. In addition, Comsat is required to file a nine or ten-year tariff for digital bearer circuits employing TDMA/DSI technology, and within a year will develop other IDR and TDMA offerings that will include monthly or quarterly lease terms.

17. The agreement reflects AT&T's intention to make extensive use of circuit multiplication equipment on digital bearer circuits, which the parties state will result in a substantial reduction in end user cost per satellite path as compared to the present cost of FM satellite circuits. The agreement contains a schedule for activating digital bearers (including both new circuits and circuits converted from FM), and sets forth efficiency factors for deriving multiple voice-grade circuits from each digital bearer circuit. AT&T has agreed not to reduce the number of circuits obtained pursuant to this agreement before 1995, unless it experiences a global decrease in IMTS requirements. The agreement also notes that AT&T's stated intentions and plans entail substantial use of Comsat capacity for IMTS after 1994, and provides for continuing discussions between Comsat and AT&T that will facilitate such use in the post-1994 period. The agreement is intended to be non-exclusive and does not preclude Comsat from reaching similar agreements with other U.S. international service carriers with respect to their IMTS traffic, nor does it preclude AT&T from placing traffic not covered by the agreement on whatever facilities it should select, consistent only with U.S. law and international obligations.

18. Comsat and AT&T contend that the public interest will be served if the Commission relies upon the agreement as a substitute for circuit distribution guidelines and thereby remove from the regulatory arena issues relating to AT&T's use of Comsat's INTELSAT space segment capacity. The parties believe that the agreement will ensure the continued availability of high quality communications services at reasonable prices, and provide for greater certainty and efficiency in planning for major international transmission facilities. In addition, they assert that the agreement will: (1) stimulate U.S. demand for additional services, by reducing costs and increasing service options;

(2) further the introduction of new technology, by facilitating the use of digital circuits and circuit multiplication equipment; (3) promote the development of competition in the provision of IMTS services, by making satellite capacity available subject to tariff on terms favorable to all; and (4) advance the U.S. objective of support for the INTELSAT system, by enabling both Comsat and INTELSAT to be strong and competitive in the years ahead.

**B. Comments on the Agreement**

19. The joint supplemental comments submitted by AT&T and Comsat and the agreement set forth a joint position which differs significantly from the individual positions taken by each of these parties in their initial comments in this proceeding. The position taken by AT&T and Comsat also represents an addition to the range of post-1988 circuit distribution policy options currently reflected in the record of this proceeding. We therefore sought comment on the joint supplemental comments and the agreement before making a decision in this proceeding.

20. NTIA urges the Commission to accept the proposed agreement between Comsat and AT&T and end its direct regulation of circuit distribution among available cable and satellite facilities. NTIA states that the agreement obviates the need for the Commission to impose a further regulatory mechanism to achieve a transition to a competitive intermodal marketplace. However, NTIA did not take a position on the fairness of the terms. Rather, it reasons that "two sophisticated parties operating at arms length are better able to assess the business bargain they have struck." It notes that the terms of the agreement establish a framework that will last only until 1994. Thereafter the value and pricing of INTELSAT's services will have to be able to stand largely on their own, NTIA explained.

21. Neither MCII nor US Sprint, AT&T's two biggest competitors in the IMTS market, opposes the agreement. MCII believes that the agreement provides a reasonable framework for facilities planning during the 1988-1994 period, but that the Commission must insure that its implementation occurs in a manner consistent with Commission policies and the public interest. MCII seeks to assure that issues not addressed by the agreement and operational complications associated with its implementation be resolved in a timely basis through the cooperative efforts of all interested parties. MCII believes that the Commission should review the operational details of implementation of the agreement during the pre-1994 period and the development of processes for facilities planning in the post-1994 period. Finally, MCII is concerned that implementation of the agreement does not result in denial of access to cable and satellite facilities to other international carriers.

22. US Sprint states that the agreement appears to give AT&T increased loading flexibility in a manner that does not conflict with IMTS competition or compromise INTELSAT's viability. US Sprint believes that agreement between parties is a better means of assuring fulfillment of the Commission's goals than adoption of further regulatory guidelines and that Comsat's proposed 10-year tariff provides some assurance that all carriers will be treated equally during the term of the agreement. However, US Sprint urges the Commission to monitor AT&T's facilities use and to be prepared to reassert its authority should the public interest so require, if Comsat and AT&T fail to agree to a circuit distribution arrangement for the post-1994 period.

23. Fedex contends that the long-term discounted Comsat tariff contemplated by the AT&T-Comsat agreement will discriminate against small, start-up carriers which do not have a stablized revenue base to enable them to subscribe to long-term discounted rates. Fedex maintains that the discounted tariff is inconsistent with the 1934 Communications Act and 1962 Satellite Act and achievement of the Commission's policy of fostering new entrants and competition in the international market. Fedex also expresses concern about those provisions of the Comsat/AT&T agreement which call for coordination of AT&T and Comsat activities in support of the agreement and under which the parties have agreed not to oppose each other's future financial or satellite facilities plans.

24. PAS asserts that the Comsat/AT&T agreement has the potential for distorting the marketplace by (1) limiting AT&T's capability to move traffic to alternative facilities, and (2) removing Comsat's incentives to improve service and lower rates. PAS maintains that the agreement locks-in AT&T's use of Comsat's facilities just as the Commission is attempting to introduce the benefits of competition. PAS also raises a number of questions concerning the manner in which Comsat determined the long-term rates for satellite facilities specified in the agreement, the level at which those rates are set, and the appropriateness of now specifying a ceiling for rates which will be in effect in 2004. PAS also asserts that the agreement may place INTELSAT in a position to squeeze Comsat's margins on IMTS, thus giving INTELSAT undue influence over Comsat on policy and pricing matters that might be raised at Board of Governors meetings. PAS asserts that, among other things, the agreement raises questions as to (1) whether the Commission should re-evaluate the present prohibition against separate satellite systems competiting for IMTS, and (2) whether the public interest is served by the agreement's requirement that AT&T refrain from making or supporting any request or proposal to the U.S. Government that would interfere or be inconsistent with the terms of the agreement. Finally, PAS states that the Commission cannot assume the fairness of the agreement, but must review its terms to assure fairness not only to Comsat and AT&T, but also U.S. ratepayers, and other carriers and providers of international facilities.

25. In joint reply comments, Comsat and AT&T state the agreement promotes the Commission's principal objectives in considering future circuit distribution policies: (1) the viability of the INTELSAT system; (2) the growth of cable/satellite competition; and (3) the availability of facilities options for other U.S. carriers. Comsat and AT&T state that INTELSAT's viability is preserved because the agreement provides for AT&T to place at least 34% of its growth traffic over the next seven years on INELSAT in addition to retaining all of AT&T's IMTS traffic current on the system. They contend that it is untrue that smaller carriers are disadvantaged by the ten-year lease terms because the long-term rates will be available to users other than AT&T, regardless of the volume of capacity committed to by those other users. They assert that such long-term commitments are already quite familiar to the smaller United States carriers as most of them contract for submarine cable capacity based on the twenty-five year life of those cable systems. Further, they state that the agreement permits AT&T flexibility in placing uncommit-

ted traffic over other facilities and gives Comsat the incentive to compete for this traffic in terms of rates and service quality. They also note that, after 1994, AT&T is free to place its traffic anywhere it wishes. Consequently, Comsat has an incentive to continue improving service and reducing prices, rather than see the bulk of this traffic to cable or other media. They dispute the contention that the agreement places INTELSAT in a position to squeeze Comsat's margins on IMTS and thereby exercise undue influence on Comsat on policy and pricing issues. It is the presence of AT&T's traffic on the INTELSAT system which provides the greatest single assurance that INTELSAT's charges will not go up, and that INTELSAT will remain viable. Comsat's participation in INTELSAT Board of Governors meetings will remain subject to U.S. government instructions and that, in any event, Comsat would forcefully advocate U.S. interests within INTELSAT. Finally, AT&T and Comsat find the MCII and US Sprint recommendations for continued Commission oversight of loading developments to be entirely appropriate. They suggest that the Commission rely on the semi-annual reports that AT&T has agreed to provide Comsat under the agreement to accomplish such monitoring. AT&T states it is prepared to file these reports with the Commission and have them made publicly available.

## IV. DISCUSSION

26. Upon review of all of the comments and other submissions that we have received in this proceeding, we conclude that we should end imposition of circuit distribution guidelines. We reach this conclusion for three reasons: (1) circuit distribution guidelines that guarantee INTELSAT minimum levels of traffic have served their purpose and are no longer needed to carry out the objectives of the Communications Satellite Act of 1962; (2) a continued regulatory policy that acts to merely guarantee traffic to INTELSAT creates disincentives for it to take steps necessary to adapt to an increasingly competitive environment; and (3) continuation of guidelines would be inconsistent with development of a policy that permits carriers and users to make facilities and service decisions free from unnecessary regulatory interference. We further conclude that, with certain modifications, the Comsat/AT&T agreement provides a basis for ending all circuit distribution guidelines at this time. We find that the agreement assures INTELSAT of a substantial amount of AT&T traffic in the future which will provide a firm basis for INTELSAT's operations. Equally important, the agreement gives INTELSAT and Comsat substantial incentives to adapt to an increasingly competitive environment. Also, taking into consideration the Common Carrier Bureau's recent action in requiring certain modifications to Comsat's tariff filing, we find that the agreement does not threaten the ability of other U.S. carriers to make future facility choices or otherwise harm their ability to compete. We will however monitor and retain jurisdiction to take any necessary action with respect to AT&T's future facility choices in order to preserve our ability to: (1) ensure continued fulfillment of the objectives of the Communications Satellite Act; (2) promote the successful development of competition in international communications; and (3) provide satellite facilities that satisfies national defense and security needs.

### A. Policy Basis for Ending Guidelines

27. The underlying purpose of circuit distribution guidelines has always been to ensure the continued fulfillment of the fundamental objective of the Communications Satellite Act -- the establishment and operation of a global commercial communications satellite system.[11] Thus, Commission policy has been to maintain the viability of the global system by requiring substantial use of the global satellite system by U.S. carriers which serve end-users directly and have investment interests in submarine cables. However, continued Commission imposition of circuit distribution guidelines is not the only means of assuring fulfillment of the fundamental objective of the Satellite Act. Continuation of such a policy is unnecessary in view of the successful growth of INTELSAT and the clear commitment of AT&T to continue to make substantial use of the INTELSAT system as evidenced by its agreement with Comsat. We believe that we can now adopt a policy which will end all circuit distribution guidelines in a manner that is consistent with the objectives of that Satellite Act and other public interest considerations.

28. In our most recent decisions on this issue, we found that the IMTS markets in the Atlantic and Pacific Ocean regions were not then sufficiently competitive to permit us to withdraw from decisions concerning the distribution of those circuits.[12] Therefore, we concluded it was necessary to continue to subject AT&T's IMTS and 800 service-overseas circuits to circuit distribution guidelines. It is clear that AT&T continues to be the dominant U.S. carrier in the provision of IMTS. At year-end 1985, AT&T accounted for 98.6 percent of the messages, 98.7 percent of the minutes and 98.6 percent of the revenues for originating and terminating CONUS IMTS traffic.[13] MCII had 1.1 percent of the messages, 1.1 percent of the minutes and 1.1 percent of the revenues and US Sprint had 0.3 percent of the messages, 0.3 percent of the minutes and 0.2 percent of the revenues. At year-end 1986,[14] AT&T's shares decreased to 94.4 percent of the messages, 94.2 percent of the minutes and 95.0 percent of the revenues. MCII's shares increased to 4.2 percent of the messages, 4.3 percent of the minutes and 3.8 percent of the revenues; US Sprint's shares increased to 1.4 percent of the messages, 1.5 percent of the minutes and 1.2 percent of the revenues. However, while we cannot conclude that the 1986 loss of traffic by AT&T to new competitors represents a trend, it is significant that MCII and US Sprint both have been able to obtain operating agreements with a large number of countries in the past few years. MCII currently provides service to 139 countries[15] and US Sprint provides service to 68 countries.[16] MCII has direct operating agreements with 32 countries, eight of which are among the ten largest overseas markets; US Sprint has direct operating agreements with 17 countries, seven of which are among the ten largest overseas markets. Particularly significant is the penetration made by MCII and US Sprint in the largest overseas markt, the United Kingdom. At year end 1986, MCII accounted for 9.19 percent of the revenues for U.K. service originating in the United States and 11.1 percent of the revenues for service terminating in the United States. US Sprint accounted for 3.4 percent of the revenues for service originating in the United States and 3.1 percent for U.K. service terminating in the United States. The United Kingdom accounts for 11.3 percent of the revenues received by U.S. carriers for service originating in the United States and 17.7 percent of the revenues for service terminating in the United States.[17] Thus, while we can conclude that the foundation clearly has been established to achieve meaningful competition in the over-

seas IMTS market, it is not clear that sufficient competition now exists for us to rely on marketplace factors alone to ensure efficient use of all facilities by AT&T. However, we believe that other factors provide a clear basis for now ending circuit distribution guidelines. The primary factor is the Comsat/AT&T agreement.

29. It is clear that AT&T intends to make substantial use of satellite facilities in the future. The extent of AT&T's commitment in the Comsat/AT&T agreement to the future use of INTELSAT satellite facilities is significant. As described above, AT&T is committed by the agreement to place on INTELSAT via Comsat a year-end 1987 base of 20,099 voice-grade circuits and an average of 34 percent of its global IMTS and 800 service growth traffic during each calendar year for 1988 through 1994.[18] AT&T may activate additional satellite circuits to meet its needs during this period and has flexibility to redistribute its circuits among different regions. In addition, the agreement includes a schedule for activating digital bearer circuits (new circuits and circuits converted from FM circuits) and establishes efficiency factors for deriving multiple voice-grade circuits from each digital bearer circuit. We find that the combined effect of these provisions is to maintain a level of use of INTELSAT facilities by the dominant U.S. service provider which we believe is sufficient to ensure that the goals of Satellite Act continue to be fulfilled and at the same time, give AT&T flexibility in making circuit distribution decisions in the face of growing competition. Equally important, the agreement provides both INTELSAT and Comsat incentives to adapt to an increasingly competitive environment in the provision of international transmission facilities.

30. Under the agreement, AT&T will continue to account for a significant portion of INTELSAT's revenue requirement. While the percentage of AT&T's IMTS voice paths routed via INTELSAT facilities decreases from approximately 61.1 percent at year-end 1987 to 45.7 percent at year-end 1994, the number of AT&T's IMTS voice paths placed on INTELSAT will increase each year during the period based on AT&T's October 1987 traffic forecast (*See* Table I).[19] Thus, during the period of the agreement the number of AT&T's IMTS voice paths will increase by 14,468 or approximately 72 percent. As is shown in Table III,[20] the estimated INTELSAT annual revenue from the carriage of AT&T and its correspondents' IMTS full circuit account for approximately 36 percent of its total revenue requirement in 1988. This ratio declines to approximately 29 percent in 1989, and stays roughly at the level of approximately 24 percent during the 1990-1994 period. Although these figures are comparatively lower than that of 1987 as shown in Table II,[21] the decrease in INTELSAT revenue must attributed not to AT&T's adjustment of the cable/satellite distribution but to its exploitation of technology and its relative economy by transitioning to satellite digital bearer circuits.[22]

31. In view of the foregoing, we conclude that the Comsat/AT&T agreement provides a basis for us to end the imposition of circuit distribution guidelines on AT&T at this time.[23] The agreement provides a reasonable balance between AT&T's desire for flexibility in use of international transmission facilities and Comsat's desire for stability and predictability in the traffic it is to receive from its largest customer. Stability and predictability to INTELSAT traffic and revenue forecasting is important since the life cycle of an INTELSAT satellite is now more than 15 years from initial planning to end of operation. Comsat believes that AT&T's commitment to allocate substantial growth traffic to satellites during the period should provide INTELSAT a firm basis for its operations during the period of the agreement. Under these circumstances, no purpose is served in substituting our judgment on this matter for the business judgment of the U.S. Signatory which must bear the risk of future investment in INTELSAT. In addition, although economic, operational and technical factors may cause AT&T and its foreign correspondents to vary their current commitments after that period, we believe they have sufficient incentives to assure that INTELSAT's viability is not jeopardized. As AT&T points out, loading decisions are made jointly by AT&T and its foreign correspondents through negotiation and compromise. AT&T's foreign correspondents are themselves INTELSAT signatories who have investments in the global system and an interest in maintaining its continual viability. We question whether they would agree to deny INTELSAT sufficient IMTS growth traffic to cover its revenue requirements. In any event, as we discuss below, we will monitor and retain jurisdiction to take any necessary action with respect to AT&T's facilities choices in order to protect the public interest should future problems arise.

32. In addition, by all measures, it can be concluded that INTELSAT is a strong, viable operation. It is a 114 member-nation, non-profit cooperative which owns and operates a global communications satellite system. This system is used for both international and national communications. It comprises a network of 15 operational satellites in geosynchronous orbit over the Atlantic, Indian, and Pacific Ocean regions, with service to more than 700 international and domestic earth station antennas via about 1,800 pathways. INTELSAT provides about two-thirds of the world's telephone service, most of the international television traffic, and also telex and data service. It serves 170 countries, territories and possessions directly and indirectly. There were 89,712 full time half circuits in service in 1986; total investment at the end of the year was $1.5 billion. Total revenues have steadily risen from $457 million in 1985 to $488 million in 1986 and $517 million in 1987.

33. We believe that a policy which discontinues Commission imposed circuit distribution guidelines in favor of private agreements will provide incentives to INTELSAT to take measures to adapt to a more competitive environment. INTELSAT faces growing competition from alternative international satellite systems and the emerging fiber optic cable technology. Fiber optic cable technology appears to pose a more immediate and significant competitive threat to INTELSAT than do alternative international satellite systems.[24] Comsat recognizes that service cost will be the primary determinant, along with service quality, reliability and cable/satellite ownership interests, to countries in deciding whether to shift large amounts of their traffic from satellite to cable.[25] INTELSAT and Comsat have already taken actions to meet the competitive challenge posed by fiber optic cable. INTELSAT has introduced multi-year charges to signatories for voice and data circuits and has adopted new charges for digital services that will permit users to pay for a fixed unit of capacity but multiply the number of circuits obtained through that unit of capacity through circuit derivation technologies and thus reduce the per-circuit price.[26]

34. We agree with NTIA that neither INTELSAT nor Comsat has a "permanent entitlement to set levels of traffic" merely because we have placed circuit loading restrictions on AT&T in the past. INTELSAT must be encouraged to continue to introduce pricing innovations that are designed to attract traffic on high density routes as well as take steps to reduce and control costs, improve traffic forecasts, prudently plan for and deploy follow-on satellite capacity, and develop satellite technology in a manner that provides greater customer efficiencies, service quality and cost benefits. However, the continued viability of the global system in an emerging competitive environment will depend on whether INTELSAT continues to take steps to place its operations on a sound business footing and its signatories pass on benefits of lower charges and make new services available to end users. Retention of Commission imposed circuit distribution guidelines would work as a disincentive to INTELSAT and its members to continue such improvements. We believe the fact that the Comsat/AT&T agreement will expire in 1994 will provide incentive to INTELSAT and its members to continue improvements. Moreover, although we are retaining jurisdiction over and monitoring AT&T's facilities choices, we do not anticipate re-imposition of circuit distribution guidelines or other regulatory measures if INTELSAT fails to take actions necessary to become competitive. We believe that Comsat or any other party which seeks the re-imposition of circuit distribution guidelines will bear the burden of demonstrating that INTELSAT has taken necessary actions to offer a competitive choice to cable alternatives in terms of price, operational and technical factors. While the United States will continue to support and, we expect, be a chief supplier of traffic to INTELSAT, it will not unconditionally guarantee INTELSAT's success through policies that do not serve the broader public interest.

35. The objective of this proceeding is to develop a policy that is consistent with the objectives of Section 102 of the Satellite Act, but does not place unnecessary restrictions on AT&T facilities choices in an increasingly competitive market. We find that the retention of circuit loading guidelines would be fundamentally inconsistent with the development of a competitive market for IMTS traffic. We recognize that the success of our proposed policy depends on AT&T making economically efficient decisions about its relative use of cable and satellite facilities. We believe that it will have the incentive to do so as competition further develops during the period covered by the Comsat/AT&T agreement. Faced with developing competition and the potential erosion of market position, AT&T will have the incentive to make facilities decisions based on cost and service considerations and customer preferences. The continuation of circuit distribution guidelines will unnecessarily restrict AT&T's ability to respond to emerging competition when such restrictions are not required to reasonably assure INTELSAT's viability. The result will be to diminish the benefits of competition to the public. The Comsat/AT&T agreement strikes a reasonable balance in achieving our objectives in this proceeding.

36. We disagree with those parties which claim that abandonment of circuit distribution guidelines will lead to an increase in space segment rates and a shortage of cable facilities. The introduction of fiber optic submarine cables place INTELSAT and Comsat under pressure to find ways of cutting costs and reducing rates in the long run in order to remain competitive on the high density routes that will be served by the cables. Moreover, these parties provide no credible evidence that discontinuing circuit distribution guidelines will result in a shortage of available cable circuits. On the contrary, U.S. carriers will have a wider choice of facilities than ever before. In the North Atlantic, TAT-8 is scheduled to begin operation in 1988 and will have a capacity of 560 Mbps.[27] TAT-9 is being proposed for operation as early as 1991 and will have double the capacity of TAT-8.[28] PTAT is scheduled to begin operation in 1989 and will have a capacity of 840 Mbps.[29] In the Pacific, HAW-4/TRANSPAC-3 is scheduled to begin operation in 1988 and will have a capacity of 560 Mbps.[30] The PPAC cable is proposed for operation in 1989 with a capacity of 840 Mbps.[31] Also, AT&T and KDD have entered into a Memorandum of Understanding for the purpose of planning for the implementation of a fiber optic cable (TPC-4) linking Japan and the U.S. Mainland.[32] In view of these scheduled and planned high capacity cable systems, and upon consideration of AT&T's current traffic projections for cable and satellite, we find no basis to conclude that discontinuance of circuit distribution guidelines will lead to a shortage in available cable facilities and be competitively harmful to other U.S. carriers. The broad range of high capacity facilities choices that will be available to other U.S. carriers obviates the need for a lengthy transition period from seven to 12 years as proposed by several parties in order to assure predictability for planning purposes. Furthermore, concerns about the availability of sufficient cable capacity are mooted by the Comsat/AT&T agreement which effectively forecloses the possibility of a massive transfer of traffic from satellite to cables by AT&T.

37. Finally, we reject the contentions of RCA and PAS as basis for a decision in this proceeding. Both parties seek to connect INTELSAT's behavior in other areas which they find objectionable with our decision. RCA complains about allegedly improper INTELSAT actions in past Article XIV(d) consultations for transborder services. PAS complains that INTELSAT is engaging in predatory pricing practices intended to impair satellite competition and requests the Commission to either allocate IMTS traffic to international separate satellite systems or, in the alternative, remove all circuit distribution guidelines on AT&T. We believe that the issues raised by RCA and PAS are inappropriate for consideration in this proceeding. First, RCA's concerns have effectively been resolved because the transborder services in question have been successfully consulted with INTELSAT. Second, U.S. policy with respect to the provision of IMTS on separate satellite systems is clear. Separate satellite systems operators are not permitted to interconnect their systems with public-switched message networks.[33] The purpose of this restriction is to assure that INTELSAT will not be subject to significant economic harm within the meaning of Article XIV(d) of the INTELSAT Agreement. The restriction is part of an overall U.S. government policy toward the licensing of U.S. separate satellite systems and cannot be waived by action of this Commission alone. The Commission remains concerned about the difficulties experienced by U.S. separate system applicants in obtaining operating agreements. However, any consideration of the basic change in policy that PAS seeks cannot be made within the narrow context of this proceeding and must involve other agencies. Moreover, even if PAS were permitted to interconnect with the public-switched message network, we believe that extending a guaranteee of IMTS traffic to it and other separate satellite systems would be fundamen-

tally inconsistent with the competitive principles upon which U.S. separate systems policy is based. We seek to move away from unnecessary regulatory controls in carrier facility choices and not to expand them. We believe that the decision that we are making here is reasonable, responsible and will result in long-term public benefits.

**B. Concerns with the Comsat/AT&T Agreement**

38. The comments that we received on the Comsat/AT&T agreement raised issues as to the effect the agreement may have on competition and the measures that the Commission will take to implement the agreement. The issues regarding the effect on competition were raised by PAS and Fedex. AT&T's two biggest competitors for overseas IMTS, MCII and US Sprint, did not raise the same issues, but focused on concerns about implementation of the agreement.[34] We believe that many of the concerns of PAS and Fedex are unfounded and that other concerns are satisfied by action we are taking in this proceeding or the Common Carrier Bureau has already taken in connection with Comsat's tariff revisions. We further believe that the concerns raised by MCII and US Sprint are satisfied by actions we are taking in this proceeding in connection with implementation of the agreement.

**(1) Effect on Competition**

39. *Distortion of market.* PAS claims that the agreement has potential for market distortion by (1) limiting AT&T's capability to move traffic to alternative facilities, (2) giving Comsat disincentives to improve service quality and lower rates, and (3) establishing a ceiling on Comsat rates in a manner contrary to the public interest. We find that PAS's concerns are unfounded.

40. PAS's first concern appears to be premised on the expectation that the current restriction forbidding interconnection of separate satellite systems will be eliminated in the future and the public interest benefits from such a policy change be foreclosed if AT&T is permitted to make a long-term commitment to use INTELSAT facilities. However, as we have already discussed, the interconnection restriction on separate satellite systems is current policy and is not an issue in this proceeding. We do not regard speculation of what may happen in the future as a basis for rejecting or requiring major changes in an agreement that has clear public interest benefits.

41. Further, we do not agree with PAS that Comsat will lack incentive to improve service quality and lower rates under the terms of the agreement. First, the fact that AT&T is willing to make long term lease commitments under the terms of the agreement has made it possible for Comsat to make lower rates available to all of its customers. Second, the fact that Comsat is free to compete for additional AT&T traffic during the period of the agreement gives it an incentive to work to improve service quality. Third, Comsat will have a strong incentive to be competitive in terms of service quality and rates in order to obtain AT&T commitments for both embedded (base-line) and growth traffic beyond the period of the agreement. It is clear that INTELSAT must work to keep satellite communications competitive with fiber optic cables. The best policy to exploit this incentive is one that makes it responsive to the needs of its users. The Comsat/AT&T agreement provides a framework by which to implement such a policy.

42. Finally, we do not conclude that the Comsat/AT&T agreement establishes a ceiling on rates in manner inconsistent with the public interest as PAS contends. PAS states that if INTELSAT has reason to raise rates in the future,[35] Comsat would not be able to pass along these increases to AT&T. Accordingly, INTELSAT would be in a position to "squeeze" Comsat's margins on IMTS and thereby exert undue influence on Comsat in pricing matters concerning INTELSAT Planned Domestic Services (PDS) program. However, continuing Commission involvement in the process established by the U.S. government to oversee Comsat's representation of U.S. interests in INTELSAT provides an adequate mechanism to protect the public interest and guard against the scenario offered by PAS concerning PDS rates.[36] This oversight process includes the formulation and issuance of instructions to Comsat on issues to be considered by the INTELSAT Board of Governors that affect the public and national interest and foreign policy of the United States. The Department of State, NTIA and the Commission jointly participate in the formulation and issuance of instructions which are binding upon Comsat. The Commission and the other agencies have carefully followed the PDS pricing issue and will continue to do so taking into account the views of all interested parties including PAS. Under these circumstances, we do not believe that INTELSAT would be able to exert undue influence over the U.S. Signatory.

43. *Discriminatory rate structure.* Fedex contends that Comsat's long-term discounted tariffs are discriminatory because they disadvantage new carriers that do not have a stablized revenue bases to enable them to subscribe to long-term discounted rates. Fedex contends that the long-term discounted rates anticipated by the agreement provide a lower unit charge for functionally similar facilities available under shorter term tariffs at higher rates and are unlawful under the Communications Act and the Satellite Act. Fedex believes that the "two-tier" rate structure provided for under the agreement will have the effect of imposing discriminatory barriers against new entrants. We disagree.

44. First, long-term discounted rates are available to all other carriers and not just to AT&T, even though it is the traffic volume AT&T has committed to INTELSAT under the agreement which makes possible the lower long-term rates. Moreover, the discounts are not tied to any minimum volume of traffic. While the general availability of the new long-term service offering does not obviate the need for the Commission to consider its effect on other carriers, the Common Carrier Bureau has considered the question of whether the differential between the lower long-term rates and the higher short-term rates is unreasonably discriminatory in the tariff review process. The Bureau concluded that no compelling argument has presented that the introduction of long-term bearer services is so patently unlawful so as to require rejection.[37] The Bureau also found that no question was presented that would warrant investigation of the tariff at this time.[38] The Bureau's order is subject to review by the Commission under the Communications Act. Accordingly, we need not consider this issue in this proceeding. However, we do not regard as *per se* violative either of the Communications Act or of the Satellite Act the fact that Comsat has negotiated long-term arrangements with AT&T as long as those arrangements are not demonstratably harmful to the competitive posture of other carriers.

45. Second, the Common Carrier Bureau has acted to preserve the competitive posture of other carriers by assuring their flexibility in making facilities choices. In permitting Comsat's rates for long-term bearer rates to go into effect, the Bureau concluded that Comsat's proposed discontinuance of monthly-rated, non-bearer services would conflict with the Communications Act's prohibition against any undue or unreasonable preference or advantage to any class of persons, 47 U.S.C. §202(a), and with the Satellite Act's broad requirement that carriers have non-discriminatory use of and equitable access to the global system at just and reasonable rates. 47 U.S.C. 721(c)(2). In taking this action, the Bureau was responding to concerns expressed by other carriers about their ability to plan and obtain satellite facilities to meet their needs in view of Comsat's proposed discontinuance of monthly-rated non-bearer services coupled with the circuit rollover restrictions provided under the agreement and implemented by the tariff.

46. In view of these actions, we believe that the public interest benefits to be achieved by implementation of the Comsat/AT&T agreement clearly override any residual possibility of harmful effects on other carriers. The agreement permits us to end our prescription of circuit distribution guidelines in a manner that assures continued fulfillment of the original objective of Commission imposed guidelines. Moreover, as discuss below, we will continue oversight of the parties and retain jurisdiction over this matter to assure that AT&T facility decisions and Comsat service offerings promote competitive entry into the international market and otherwise remain consistent with the Communications Act and the Satellite Act.

47. *Coordination of activities.* Both Fedex and PAS express concern about provisions in the agreement which require the parties to refrain from making or supporting requests or proposals to the U.S. government that are inconsistent with the agreement, and in particular, to refrain from opposing each others financial or facilities plans. They suggest that two monopolists acting in concert in this fashion demonstrates anticompetitive aspects of the agreement and the potential for cartelization of the market. They also raise antitrust concerns. We do not believe that the public interest is disserved by Comsat and AT&T coordinating their activities to promote an agreement that is consistent with the public interest or agree not to pursue activities inconsistent with that agreement. However, we find that part of the agreement which prohibits the parties from opposing each other's financial and facilities plans inconsistent with the public interest because it could have the effect of limiting Commission access to information necessary to make future decisions concerning facilities authorizations. While the parties may individually decide whether to comment on each other's financial and facilities plans under consideration by the Commission, the restriciton in the agreement is clearly unnecessary to assure each party's compliance with the agreement. We therefore require the agreement to be amended to remove the restriction. Finally, the actions we are taking in this proceeding to monitor AT&T's future facilities choices under the agreement and the Common Carrier Bureau decision rejecting Comsat's proposed discontinuance of monthly-rated non-bearer service offerings are intended to preserve the competitive posture of other carriers. These actions lesson the potential for antitrust violations and provide a mechanism for employing appropriate remedies should such problems occur.[39]

**(2) Implementation of Agreement**

48. We believe that Commission oversight of the parties and our retention of jurisdiction over this matter is necessary to carry out the objectives of the Satellite Act and to preserve the ability of other carriers to make future facility choices that meets their needs in a competitive environment. Also, we believe that oversight will be necessary to satisfy DoD's concern that any Commission policy ending the imposition of circuit distribution guidelines be conditioned on the absence of identifiable probable harm to the national defense and security. Accordingly, we will monitor AT&T's facilities loading decisions under the agreement by review of semi-annual reports AT&T is to provide Comsat under the agreement. Both AT&T and Comsat state that this is entirely appropriate. We will require AT&T to file those reports with the Commission to be made publicly available. In addition, we will require AT&T and Comsat to inform the Commission of any negotiations that may lead to changes in or extension of the terms of the agreement and submit amendments to the Commission for review as soon as possible but not later than 90 days prior to their effective date. The changes or extensions may take effect absent Commission action to the contrary prior to the end of the 90-day period. We will make all amendments publicly available and retain the option of seeking public comments on them. In addition, we may review any changes in the agreement after opportunity for notice and comment and take any action that may be necessary and appropriate to fulfill statutory and other policy objectives.

## V. CONCLUSION

49. We have concluded that we should end imposition of circuit distribution guidelines at this time. In reaching this conclusion, we have found that: (1) circuit distribution guidelines that guarantee minimum levels of traffic to INTELSAT have served their purpose and are no longer needed to carry out the objectives of the Satellite Act; (2) continued regulatory policy that acts to merely guarantee traffic to INTELSAT creates disincentives for it to take steps necessary to adapt to an increasingly competitive environment; and (3) continuation of guidelines would be inconsistent with development of a policy that permits carriers and users to make facilities and service decisions free from unnecessary regulatory interference. We have further concluded that, with certain modifications, the Comsat/AT&T agreement provides a basis for ending all circuit distribution guidelines at this time. The agreement assures INTELSAT of a substantial amount of AT&T traffic in the future which will provide a firm basis for INTELSAT's operations. Equally important, the agreement gives INTELSAT and Comsat substantial incentives to adapt to an increasingly competitive environment. With the actions we are taking in this proceeding and those already taken by the Common Carrier Bureau in considering the tariff filed by Comsat to implement the agreement, we believe that the ability of other U.S. carriers to make future facility choices to meet their needs in a competitive environment has been preserved. We will, however, monitor AT&T's future facility choices and Comsat's service offerings and retain jurisdiction in this area in order to: (1) preserve our ability to ensure continued fulfillment of the objectives of the Communications Satellite Act; (2)

promote the successful development of competition in international communications; and (3) provide satellite facilities that satisfy national defense and security needs.

50. Accordingly, IT IS ORDERED that all circuit distribution guidelines currently applicable to AT&T's IMTS and 800-service overseas are HEREBY TERMINATED.

51. IT IS FURTHER ORDERED that, subject to the modifications required in paragraph 47 of this Report and Order, the Comsat/AT&T agreement shall serve as the basis for ending all current circuit distribution guidelines applicable to AT&T IMTS and 800-service overseas.

52. IT IS FURTHER ORDERED that Comsat and AT&T shall submit to the Commission the modifications to the agreement that are required in paragraph 47 above within 30 days of the effective date of this Order.

53. IT IS FURTHER ORDERED that Comsat and AT&T shall apprise the Commission of any negotiations that may result in changes in or extensions of terms of the agreement and shall submit such changes or extensions to the Commission for review as soon as possible but no later than 90 days before they are to take effect. The changes or extensions may take effect absent Commission action to the contrary prior to the end of the 90-day period.

54. IT IS FURTHER ORDERED that the Commission shall monitor AT&T's facility choices and Comsat's services in order to (1) ensure continued fulfillment of the objectives of the Communications Satellite Act; (2) preserve the ability of other U.S. carriers to compete in the international communications market; and (3) provide satellite facilities that satisfy national defense and security requirements.

55. IT IS FURTHER ORDERED that the Commission retains jurisdiction over the Comsat/AT&T agreement to require further changes in the agreement after notice and opportunity for comment in order to ensure fulfillment of the objectives identified in paragraph 54 above.

56. IT IS FURTHER ORDERED that AT&T shall submit to the Commission for public availability a copy of each semi-annual report that it provides Comsat as required under Article VII of the agreement.

57. IT IS FURTHER ORDERED that Comsat and AT&T shall provide the Commission with any additional information which may be required in the future to ensure fulfillment of the objectives stated in paragraph 54 above.

58. IT IS FURTHER ORDERED that NTIA's motion to accept late filed comments and M/A-COM's motion to accept late filed reply comment are GRANTED.

59. The information collection requirement in paragraph 56 above is not subject to the clearance procedures of Section 3507 of the Paperwork Reduction Act of 1980, 20 U.S.C. 1221-23, since less than ten persons are required to respond.

60. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because policy changes adopted in this proceeding will not have a significant economic impact on small entities. *See* 5 U.S.C. Sections 603, 604, 605(b) (1976). The Regulatory Flexibility Act does not apply to this proceeding because that Act excludes from its application all proceedings such as this that involve "a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting practices relating to such rates, wages, structures, prices, appliances, services, or allowances."

61. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause a summary of this Report and Order to be published in the Federal Register and shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

62. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] North Atlantic Telecommunications,101 FCC 2d 1259 (1985).

[2] Pacific Telecommunications,102 FCC 2d 353 (1985).

[3] Policy for Distribution of U.S. International Carrier Circuits (Notice of Proposed Rule Making) 2 FCC Rcd 2109 (released April 10, 1987).

[4] Under this option, the percentage of AT&T's IMTS and 800 service-overseas circuits which AT&T would be free to place on either cable or satellite facilities would be increased annually until AT&T has the flexibility to place 100 percent of such circuits on either transmission medium. AT&T would be permitted to deload either cable or satellite facilities in order to achieve the annual flexibility in circuit distribution permitted under the policy. We requested comments on scenarios which would result in AT&T achieving 100 percent flexibility after one, three, five, seven, ten and twelve years.

[5] Under this option, AT&T would be free to distribute its new, or growth, IMTS and 800 service-overseas circuits as it and its correspondents see fit after year-end 1988. AT&T would also be permitted to linearly decrease the IMTS and 800 service-overseas satellite circuits it is using at year-end 1988 over the period of time which INTELSAT is using space segment in which its investment is currently "sunk".

[6] NTIA filed a motion to accept late filed comments, which we hereby grant.

[7] M/A-COM filed a motion to accept late filed reply comments, which we hereby grant.

[8] Public Notice, DA 87-1501 (released October 15, 1987).

[9] Communications Satellite Corporation (Transmittal No. 674) DA 88-191 (released February 17, 1988).

[10] PAS recognizes that this alternative necessarily implies lifting the present restriction on interconnection of separate system facilities with the public switched network. *See* Establishment of Satellite Systems Providing International Communications (Separate Systems Decision), 101 FCC 2d 1046 (1985), Separate Systems Reconsideration, FCC 86-144 (released April 17, 1986); Separate Systems Further Reconsideration, FCC 86-471 (released October 31, 1986). PAS asserts that now is an appropriate time for Commission reevaluation of the current separate system restrictions.

[11] Our involvement in circuit distribution decisions arose primarily as a consequence of our 1966 Authorized User Policy (Authorized User I). Under the Authorized User I policy, Comsat's role was limited primarily to that of a "carriers' carrier"

providing satellite circuits to the USISCs for their use in furnishing international common carrier services to end users. Comsat was permitted to provide circuits directly to end users, absent a waiver, only in "unique and exceptional circumstances." As a consequence, Comsat was not able to develop its own traffic base directly from users and relied on AT&T and the international record carriers (IRCs) for nearly all of its traffic. In order to promote the objectives of the Satellite Act, we acted to insure that AT&T and the IRCs, which served end users directly and had investment interests in circuits in submarine cables through ownership of indefeasible rights of user (IRUs), made adequate use of the global satellite system.

[12] North Atlantic Telecommunications, 101 FCC 2d 1259 (1985); Pacific Telecommunications, 102 FCC 2d 353 (1985).

[13] Common Carrier Bureau, Industry Analysis Division, "Trends in International Telecommunications Services 1975-1986" (December, 1987) at Table 9.

[14] Data for year-end 1987 is not yet available to the Commission.

[15] *See* MCII Tariff No. 1.

[16] *See* US Sprint Tariff No. 2.

[17] *See* Common Carrier Bureau, Industry Analysis Division, "International Communications Traffic Data Report" (October 1987).

[18] In addition, AT&T has committed substantial investments in earth stations to provide international services. It initially invested $67 million in joint ownership of earth stations operated under the Earth Station Ownership Committee (ESOC) agreement and has now made an additional investment of $54 million for the purchase of the Etam, Roaring Creek and Jamesburg ESOC multi-purpose stations. AT&T's application (ITC-87-109) to acquire and operate the interests of Comsat International Communications, Inc. (CICI), MCII and RCA in the three earth stations was granted in an order released last year. American Telephone and Telegraph Company, 2 FCC Rcd 6635 (released October 28, 1987). It also has invested $9.4 million in the Triumpho Pass, California multi-purpose station and projects an additional $5.7 million for the Corum, New York multi-purpose station which it proposes to build. Also, it has invested more than $10 million in smaller IBS earth stations.

[19] Table I provides estimates of AT&T's IMTS voice paths via satellite under the agreement. The estimates are based on Common Carrier Bureau staff calculations using AT&T's July 1987 circuit forecast and the stipulations between the parties in the agreement as to: (1) the percentage of the growth traffic to be placed on satellites for each year of the period of the agreement; (2) the percentage of the total satellite voice paths to be placed on digital circuits; and (3) the efficiency factors to determine the number of derived circuits that can be provided through bearer circuits.

[20] Table III compares the estimated INTELSAT revenue requirement for each year of the period of the agreement with the estimated IMTS revenue to INTELSAT from AT&T and its correspondents. The estimated INTELSAT revenue requirement for each year is provided by INTELSAT Board of Governors documents (BG-74-27 and BG-74-28). The estimated IMTS revenue from AT&T and its correspondents were calculated in Table II.

[21] Table II estimates INTELSAT's IMTS revenue from AT&T and its correspondents for each year of the agreement. The estimates are based on Common Carrier Bureau staff calculations based on the number of FM and digital bearer circuits to be used by AT&T and applying the INTELSAT tariffs for FM and digital bearer circuits.

[22] The satellite digital bearer circuits are capable of providing more than four voice paths when equipped with digital circuit multiplication equipment. The agreement contemplated that AT&T will transition to the use of satellite digital bearer circuits equipped with circuit multiplication equipment to carry its IMTS voice paths. The agreement provides a schedule for the distribution of IMTS traffic on satellite digital bearer circuits each year between 1988 and 1994 and specifies the average number of voice paths which may be derived from digital bearer circuits each year. Because AT&T will be transitioning from use of FDM FM satellite circuits where one such circuit is required for each IMTS voice path to digital bearer circuits from which it may derive between 3.96 and 4.29 voice paths from each bearer circuit, the number of INTELSAT satellite circuits required by AT&T to route an increase number of IMTS voice paths via satellite will actually decrease.

[23] Since the Comsat/AT&T agreement has worldwide applicability to take effect in 1988, we will terminate upon release of this order current circuit distribution restrictions applicable to the Pacific Ocean Region and not otherwise scheduled to end until year-end 1991. In addition, in 1985, we exempted all other carriers from the imposition of circuit distribution guidelines. The record in this proceeding supports our tentative conclusion in the NPRM that there is no basis to consider re-imposition of guidelines on other carriers.

[24] The separate satellite systems that have been conditionally authorized by the Commission are restricted to the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public-switched message networks. Thus, U.S. separate satellite systems are prohibited from competing with INTELSAT for IMTS traffic. In addition, separate systems applicants have found that obtaining operating agreements from administrations that have been traditionally committed to INTELSAT has been a slow process. In contrast, three major submarine fiber optic cable systems have been authorized and another is planned to provide service between the U.S. and foreign points. These systems may carry IMTS traffic and will principally operate over heavy traffic routes.

[25] Comments of Communications Satellite System in response to the "Request for Comments on U.S. International Communications Policy" issued by the Communications Subcommittee, Committee on Commerce, Science, and Transportation, United States Senate, Question A, p. 3 (June 26, 1987).

[26] Comsat Comments to the Subcommittee at p. 8.

[27] American Telephone and Telegraph Co., *et al.*, (TAT-8 order) 98 FCC 2d 440 (1984).

[28] *See* the May 11, 1987 General Comments of the United States International Service Carriers in Docket No. 79-184.

[29] Private Submarine Cable decision, 100 FCC 2d 1033 (1985); Tel-Optik, Limited, Mimeo No. 4618 (released May 17, 1985).

[30] American Telephone and Telegraph Co., *et al.*, (HAW-4/TPC-3 decision), Mimeo No. 1794 (released January 7, 1986).

[31] Pacific Telecom Cable, Inc., Mimeo No. 2894 (released April 22, 1987).

[32] Memorandum of Understanding to Plan for the TPC-4 Cable System (July 13, 1987).

[33] Separate Systems decision, 101 FCC 2d 1046 (1985).

[34] MCII did raise concerns in response to Comsat's tariff submission as to the effect of the agreement's circuit rollover restrictions on the ability of smaller carriers to plan and implement

their facility networks in an efficient manner. Those concerns were addressed by the Common Carrier Bureau in its February 17, 1988 Order.

[35] PAS speculates that INTELSAT may have to increase its charges in the future if it encounters system usage below projections or unanticipated costs. However, the very nature of AT&T's long-term commitment promotes more accurate system usage projections and enhances INTELSAT's ability to plan new facilities according to anticipated need. As a result, it is less likely that a situation will occur that requires an increase in charges.

[36] Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Committee, 77 FCC 2d 564, 811 (1980); Memorandum of Understanding between the Commission, the NTIA, the Department of State and Comsat, September 28, 1984.

[37] *See* footnote number 9.

[38] In view of the significant discounts provided for in the tariff rates filed by Comsat to implement the agreement, we direct the Chief of the Common Carrier Bureau to advise us within 30 days as to whether AT&T should be required to take any specific action to flow through these savings to its customers.

[39] *See* United States v. FCC 652 FCC 2d 72 at 106 (D.C. Cir. *en banc* 1980) citing National Association of Utility Commissioners v. FCC, 525 F 2d 630, 638 (D.C. Cir.) *cert.* denied, 425 U.S. 992 (1976).

Table I

Estimated AT&T's IMTS Voice Paths (V.P.) via Satellite

| | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 |
|---|---|---|---|---|---|---|---|---|
| AT&T Global V.P. 7/87 View 1/ | 32,915 | 37,492 | 42,306 | 47,195 | 52,334 | 58,722 | 66,575 | 75,633 |
| Growth, V.P. | -- | 4,577 | 4,814 | 4,889 | 5,139 | 6,388 | 7,853 | 9,058 |
| % of Growth Alloca. to Satellite 2/ | -- | 55.0 | 20.0 | 45.0 | 35.0 | 30.0 | 30.0 | 30.0 |
| Total V.P. via Satellite | 20,099 | 22,616 | 23,579 | 25,779 | 27,578 | 29,494 | 31,850 | 34,567 |
| % of V.P. via Satellite | 61.06 | 60.32 | 55.73 | 54.62 | 52.70 | 50.23 | 47.84 | 45.70 |
| % of Satellite V.P. on FM | | 63.58 | 38.77 | 31.85 | 29.82 | 23.96 | 17.34 | 16.67 |
| No. of Satellite V.P. on FM | | 14,379 | 9,142 | 8,211 | 8,224 | 7,067 | 5,523 | 5,762 |
| % of Sat. V.P. on Digital Bearer 3/ | | 36.42 | 61.23 | 68.15 | 70.18 | 76.04 | 82.66 | 83.33 |
| No. of Sat. V.P. on Digital Bearer | | 8,237 | 14,437 | 17,568 | 19,354 | 22,427 | 26,327 | 28,805 |
| No. of V.P. Derived per Dig. Bearer 4/ | | 3.96 | 4.12 | 4.29 | 4.26 | 4.27 | 4.28 | 4.29 |
| No. of Satellite Dig. Bearer Circuits | | 2,081 | 3,505 | 4,096 | 4,544 | 5,253 | 6,152 | 6,715 |

1/ AT&T's July 1987 traffic forecast submitted on October 14, 1987.
2/ The % of growth traffic to be placed on satellite, see page 5 of the Agreement.
3/ The % of the total satellite voice paths to be placed on digital circuits, see page 7 of the Agreement.
4/ The efficiency factors to determine the number of derived circuits that can be provided through digital bea circuits, see page 8 of the Agreement.

Table II

Estimated INTELSAT's IMTS Revenue from AT&T and its Correspondents

| | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 |
|---|---|---|---|---|---|---|---|---|
| AT&T's Satellite V.P. on FM 1/ | 20,099 | 14,379 | 9,142 | 8,211 | 8,224 | 7,067 | 5,523 | 5,762 |
| FM 1/2 Circuit-Year | | 17,239 | 11,760.5 | 8,676.5 | 8,217.5 | 7,645.5 | 6,295 | 5,642.5 |
| Comsat Annual FM Tariff($) 2/ | | 6,480 | 6,480 | 6,480 | 6,480 | 6,480 | 6,480 | 6,480 |
| Comsat FM Revenue ($M) | | 111.7 | 76.2 | 56.2 | 53.2 | 49.5 | 40.8 | 36.6 |
| INTELSAT Annual FM Tariff ($) | | 4,440 | 4,440 | 4,440 | 4,440 | 4,440 | 4,440 | 4,440 |
| INTELSAT FM Revenue ($M) | | 153.1 | 104.4 | 77.0 | 73.0 | 67.9 | 55.9 | 50.1 |
| AT&T's Digital Bearer Circuits 3/ | | 2,081 | 3,505 | 4,096 | 4,544 | 5,253 | 6,152 | 6,715 |
| Dig. Bearer 1/2 Circuit-Year | | 1,040.5 | 2,793 | 3,800.5 | 4,320 | 4,898.5 | 5,702.5 | 6,433.5 |
| Comsat Ann. Dig. Bear. Tariff ($) 4/ | | 10,500 | 10,500 | 10,500 | 10,500 | 10,500 | 9,900 | 9,600 |
| Comsat Dig. Bear. Revenue ($M) | | 10.9 | 29.3 | 39.9 | 45.4 | 51.4 | 56.5 | 61.8 |
| INTELSAT Ann. Dig. Bear. Tariff ($) | | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 |
| INTELSAT Dig. Bear. Revenue ($M) | | 11.2 | 30.2 | 41.0 | 46.7 | 52.9 | 61.6 | 69.5 |
| Total Comsat IMTS Revenue ($M) | | 122.6 | 105.5 | 96.1 | 98.6 | 100.9 | 97.3 | 98.4 |
| Total INTELSAT IMTS Revenue ($M) | | 164.3 | 134.6 | 118.0 | 119.7 | 120.8 | 117.5 | 119.6 |

1/ From Table I, Row 7.
2/ Comsat's FM prices, see page 9 of the Agreement.
3/ From Table I, Row 11.
4/ Comsat's IDR and TDMA/DNI prices, see page 10 of the Agreement.

Table III

Estimated INTELSAT Revenue Requirement vs. IMTS Revenue from AT&T and its Correspondents

| | 1987 (Actual) | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 |
|---|---|---|---|---|---|---|---|---|
| (a) INTELSAT Revenue Requirement ($ Million) 1/ | 452 | 455 | 471 | 486 | 483 | 476 | 488 | 500 |
| (b) IMTS Revenue from AT&T and its Correspondents ($ Million) 2/ | 156 | 164 | 135 | 118 | 120 | 121 | 118 | 120 |
| (b)/(a) % | 35 | 36 | 29 | 24 | 25 | 25 | 24 | 24 |

1/ INTELSAT Board of Governors documents (BG-74-27 and BG-74-28).
2/ From Table II, Row 14.

U·M·I

PAGE 2171 IS MISSING IN NUMBER ONLY.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-161**

In the Matter of

Amendment of Part 22 of the
Commission's Rules to Revise
Certain Filing Procedures for
Mobile Services Division
Applications and to eliminate
Form 430

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 30, 1988; Released: April 14, 1988**

By the Commission:

1. We are hereby issuing a Notice of Proposed Rule Making to solicit comments on proposed revisions to Part 22 of the Commission's Rules regarding the number and form of copies of Mobile Services Division applications to be filed with the Commission and the filing of FCC Form 430. Section 22.6(d) of the rules currently provides that, in general, all applications, amendments, correspondence, exhibits and attachments be submitted in duplicate and signed unless otherwise specified. Sections 22.913(b)(1)-(3) and 22.913(c) set forth the requirements for the filing of copies of initial[1] cellular applications and the requirements for certification of such applications. Section 22.11(a) of the rules requires that FCC Form 430 be filed annually by licensees and permittees for each radio service reporting all changes in ownership.

2. Our purpose is to save space, avoid the need for additional reference areas, reduce the necessity to continually add personnel to cope with the volume of work, reduce the volume of the applications currently stored in the Mobile Services Division and to increase our ability to provide service to the public with greater speed and efficiency. While we recognize that having microfiche copies of applications may increase the complexity and expense of preparing filings somewhat, we do not believe this burden to be excessive. There are several companies in the Washington area and in other major cities offering micrographic services. Similarly, the elimination of FCC Form 430 will reduce costs currently placed on licensees.

3. We are initiating this Rule Making proposing to amend Section 22.6(d) of our rules to require that all applications, amendments, correspondence, exhibits, and attachments be filed on microfiche. Non- cellular applicants and non-initial cellular applicants would be required to submit the original application as well as three[2] microfiche copies. [3] Initial cellular applicants must initially submit only two microfiche copies. Since initial cellular applications are discarded following the lottery, cellular applicants would no longer be initially required to submit the original hard copy application. Only the winning cellular applicants would be required to file two hard copies and a third microfiche copy. Since we are no longer requiring the initial filing of hard copies for initial cellular applicants, we no longer need to specify the manner in which such copies are to be filed. Therefore, we are proposing to eliminate Sections 22.913(b)(1), (2) and (3). In addition, Section 22.913(b)(4) is being amended to remove the requirements specifying certification.[4]

4. Section 22.913(c), which sets forth the requirements for filing microfiche copies for initial cellular applications, is being amended to remove the requirement for the filing of paper copies, with the exception of those winning the lottery and to require the winner to file an additional microfiche copy. Section 22.918(b), which sets forth the requirements and deadlines for amending initial cellular applications, would be amended to require that amendments be filed on microfiche and to include the filing of the paper copies and the third microfiche copy within fourteen days of the date of public notice. Finally, since most of the information requested in the Form 430 is duplicated on Schedule A of Form 401, we propose to eliminate Form 430.

5. We propose that non-cellular and non-initial cellular applicants be required to submit the original hard copy of the application with the three microfiche copies. This distinction is made due to the differences in processing initial cellular applications. Because of the large number of applications for each initial cellular license only the application of the cellular tentative selectee is subject to a more detailed review after the lottery takes place. Therefore, only the winner need submit hard copies. For non-cellular applications and non-initial cellular applications, however, *each* application is subject to a detailed review. Therefore, a hard copy of each application must be available to the staff with the initial filing.

6. We propose that the microfiche copy be in a format similar to that used for the Federal Register: 4 by 6 inches negative microform, 24X reduction, black appearing on clear transparent, readably labeled at the top and enclosed in a paper jacket. Blue/black film which appears black to the naked eye is acceptable. The microfiche must be archival quality microfiche. Archival quality for the purpose of Commission filings means the silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. Non-cellular and non-initial cellular applications would be labeled (on the jacket and at the top of the microfiche) with the name, city and state of the applicant and, if the application refers to an existing station, the call sign of that station. Initial Cellular applications would be labeled (on the jacket and at the top of the microfiche) with the name of the applicant, the name and number of the market applied for and the frequency block designation.

7. In addition, we propose that FCC Form 430 be eliminated. The staff seldom uses most of the information contained in this Form when processing applications. In addition, should the need arise for this information, most of it is contained in Schedule A of Form 401. We recognize that, unlike the current Form 430, licensees do not necessarily file a Form 401 every year. Therefore, there is a question of how current the information will be. However, it has been our experience that either because of major changes or the need for additional facilities many of our licensees do file a Form 401 every year or so. There have been approximately one and a half Form 401 filings per year per call sign. Thus, in many cases we should be able to locate current information in our files should the

need arise. In the event this information is needed and no recent Form 401 has been filed or the information is the type that is not duplicated in the Form 401[5], the staff can request such information from the licensee. This approach will also be much less burdensome than requiring all licensees to file the Form 430 annually. We invite comments on this proposal.

*Regulatory Flexibility Act Initial Analysis*

8. *Reason for Action*. The Commission is proposing revised application filing requirements for filing duplicate applications to fulfill the need for additional storage space in the Commission, reduce the necessity of adding new personnel to cope with the volume of work, reduce the volume of applications currenty stored in the Mobile Services Division and to eliminate FCC Form 430.

9. *The Objective*. The objective of this notice of proposed Rule Making is to seek public comment on the proposed additions to our rules and to reduce the volume of Mobile Services applications stored in the Commission.

10. *Legal Basis*. The Authority for this proposed Rule Making contained in Sections 1, 4(i) and 303 of the Communications Act of 1934, 47 U.S.C. Sections 1, 4(i) and 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.

11. *Description, potential impact and number of small entities affected*. This proposed Rule Making will uniformly affect all entities with a minimal cost associated with the filing of applications, amendments, correspondence, exhibits and attachments in microfiche form. We are considering exempting submissions of two pages or less from this requirement.

12. *Federal rules which overlap, duplicate or conflict with these rules*. None.

13. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*. None.

14. *Reporting, record keeping, and compliance requirements*. None.

15. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and with opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

18. Accordingly, pursuant to Sections 1, 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

19. Pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. Section 1.415, all interested persons may file comments on the matters discussed in this *Notice* and the proposed rule changes contained in Appendix A below by **June 6, 1988**and reply comments by **June 20, 1988.**

20. The Chief, Common Carrier Bureau, has delegated authority to request the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

21. Finally, the Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 601, *et seq.*).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

**APPENDIX A**

**PROPOSED RULES SECTION**

**Title 47, Part 22 of the Code of Federal Regulations is proposed to be amended as follows:**

*Part 22 - Public Mobile Service*

1. The authority citation for Part 22 continues to read as follows:

**Authority: Sections 1, 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553.**

2. Section 22.6 is proposed to be amended by revising paragraph (d) and by adding paragraphs (d)(1) and (d)(2) to read as follows:

***Section 22. 6 Filing of applications, fees, and numbers of copies.***

* * * * *

(d) Except as otherwise specified, all applications, amendments, correspondence and forms shall be submitted on microfiche with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Section 1.743. (*See* Section 22.913 for specific filing requirements for applications for an initial cellular radio communications system authorization). Non-cellular and non-initial cellular applicants must simultaneously submit the original hard copy which must be stamped "original".

(1) *Microfiche Copies.* Each microfiche copy shall be a 4x6 inch black- appearing on clear transparent negative copy microform, 24X reduction, and enclosed in a paper jacket. The microfiche must be archival quality. Archival quality for the purpose of Commission filings means the silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The jacketed microfiche must be in a 5" x 7.5" envelope. All applicants must leave the first row page images of the first fiche blank for in-house identification purposes.

(2) *Non - Cellular and Non - Initial Cellular Applications.* All non-cellular and non-initial cellular applications must have the following information printed on the microfiche jacket, the microfiche envelope and at the top of the microfiche: 1) the name of the applicant; 2) the city and state of the application and 3) if the application refers to an existing station, the call sign of that station.

* * * * *

3. Sections 22.913(b) (1), (2) and (3) are hereby proposed to be removed. Paragraphs (b)(4) and (b)(5) would be renumbered paragraphs (b)(1) and (b)(2). New paragraph (b)(1) and paragraph (c) are revised to read as follows:

***Section 22. 913 Content and form of applications.***

* * * * *

(b)(1) The initial Form 401 shall be followed by a table of contents. The exhibits specified in Section 22.13(a)(1) and (2), and Section 22.913(a)(1), (2), (8) and (10), shall immediately follow the initial Form 401 and table of contents, with the remaining exhibits required by Section 22.13, Section 22.913(a), and the remaining cell sites after that. All exhibits shall be tabbed in accordance with the table of contents.

(c) *Copies.* Each applicant shall submit two microfiche copies of its application using a 4 x 6 inch black appearing on clear transparent negative copy microform, 24X reduction, and enclosed in a paper jacket. The microfiche must be archival quality for the purpose of Commission filings means the silver handle film such as Kodak Direct Duplicatory Film. The jacketed microfiche must be in a 5" x 7.5" envelope. All applicants must leave the first row page images of the first fiche blank for in-house identification purposes. In addition, the winner of the cellular lottery for an initial construction permit in markets beyond the top-120 shall submit an original and one paper copy of its application as well as an additional microfiche copy within fourteen (14) days of notice of the lottery results. The original must be stamped "original".

(1) The following information must be printed on the microfiche jacket, the microfiche envelope, and at the top of the microfiche: 1) the name of the applicant; 2) the name and number of the market applied for and 3) the frequency block designation.

* * * * *

4. Section 22.918 is proposed to be amended by revising paragraph (b) to read as follows:

***Section 22. 918 Amendment of cellular applications.***

* * * * *

(b) *Markets below the top - 90 and Rural Service Areas.*

Amendments for applications for below-90 cellular markets may not be filed prior to conduct of the lottery for the market applied for. The tentative selectee may file minor amendments, but no major amendments except for those listed in Section 22.23(g). All amendments must be filed on microfiche. The original paper application and duplicate copy of the lottery winner with the cover labeled with the applicant's name, market, market number and frequency block applied for, the third microfiche copy as well as the information required by Section 1.65 shall be filed within 14 days of publication of the Public Notice announcing the tentative selectee in markets below the top-90 and within 30 days of the Public Notice announcing the lottery results for all applications to serve Rural Service Areas.

* * * * *

5. Section 22.11(a) is proposed to be removed. Paragraph (b) would be renumbered accordingly.

**FOOTNOTES**

[1] Initial cellular applictions refers to the original filing of an application. Non-initial cellular applications refers to applictions filed once an initial application has been filed i.e. fill-in applications.

[2] One copy would be for staff use, one for public use, and the third copy will be stored in the Commission's permanent records.

[3] We are also considering exempting submissions of two pages or less from this requirement. The Commission will assume the responsibility of microfiching such short documents. Amendments, correspondence, exhibits and attachments exceeding two pages would have to be submitted in microfiche.

[4] We emphasize that although the certification requirements for initial cellular applicants would be eliminated such requirements will ultimately be replaced by a new requirement, the precise language and form of which will be addressed in the forthcoming rural cellular proceeding.

[5] *See* questions 10(a) - 10(c) of FCC Form 430 pertaining to stock ownership.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-170**

In re Applications of

VIACOM BROADCASTING OF MISSOURI, INC. File No. BRCT-871001KG

For Renewal of License of Station
KMOV(TV), St. Louis, Missouri

and

MARK L. WODLINGER File No. BPCT-871231KE

For Construction Permit
St. Louis, Missouri

**HEARING DESIGNATION ORDER**

**Adopted: April 1, 1988; Released: April 15, 1988**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for the renewal of license of Station KMOV(TV), Channel 4, St. Louis, Missouri, filed by Viacom Broadcasting of Missouri, Inc. and the mutually exclusive application of Mark L. Wodlinger for an new commercial television station to operate on Channel 4, St. Louis, Missouri.

2. Except as indicated by the issues specified below, the applicants are qualified to operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

3. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

4. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-172**

In re Applications of

JANICE FAYE SURBER (hereafter Surber) File No. BPH-870313NB

FATE LAMONT MCANALLY (hereafter McAnally) File No. BPH-870313NE

For Construction Permit
for a New FM Station on
Channel 274A in Jellico, Tennessee

**HEARING DESIGNATION ORDER**

**Adopted: April 5, 1988; Released: April 15, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station[1].

2. The 60 and 70 dBu contours depicted on the McAnally coverage map do not correlate with the tabulations of terrain data specified in Item 15, Section V-B, of Form 301. However, an engineering study reveals that the contour map is plotted correctly. Since this error has no effect on the acceptability of McAnally's application, which complies with all of our acceptance requirements, we will require that McAnally amend the application by submitting the correct tabulations to the presiding Administrative Law Judge.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the McAnally petition to "deny and dismiss" IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That McAnally shall amend her application, as specified in paragraph 2 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commissions Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTE**

[1] On December 24, 1987, McAnally filed a petition to "deny or dismiss" the Surber application. The basis for the petition was that Surber indicated in her original application that she was not financially qualified to construct and operate the proposed station and that "appropriate financing is being arranged." On May 1, 1987, Surber timely filed an amendment certifying her financial qualifications to construct and operate the station. Accordingly, the McAnally petition will be dismissed.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-171**

In re Applications of

| | |
|---|---|
| FAITH BROADCASTING, INC. (hereafter Faith) | File No. BPH-870224MB |
| DARYL M. KASPER (hereafter Kasper) | File No. BPH-870224MR |

For Construction Permit for a New FM Station on Channel 295A (106.9 MHz) in Minot, North Dakota

## HEARING DESIGNATION ORDER

**Adopted: April 5, 1988; Released: April 15, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. APPLICANTS: Faith, Kasper.

3. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Faith, Kasper.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **May 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-268**

In the Matter of

Amendment of Section 73.202(b), RM-5265
Table of Allotments,
FM Broadcast Stations.
(Livingston, Texas)

## MEMORANDUM OPINION AND ORDER

**Adopted: March 16, 1988; Released: April 15, 1988**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Report and Order* in this proceeding, 2 FCC Rcd 1772 (1987), which substituted Channel 222C2 in lieu of Channel 221A at Livingston, Texas and modified the license of Station KETX-FM, Livingston, Texas to specify operation on Channel 222C2. This upgrade at Station KETX-FM requires a site restriction of 4.3 kilometers (2.7 miles) west to avoid short spacings to Station KTBC, Channel 221A, Nacogdoches, Texas and a pending rule making proposal to substitute Channel 223C2 at Groves, Texas in lieu of Channel 221A (RM-5612). Polk County Broadcasting Company, licensee of Station KETX-FM, has filed a petition for reconsideration requesting that this site restriction be deleted. Voice in the Wilderness Broadcasting, Inc. (Wilderness Broadcasting), licensee of FM Station KTFA, Channel 221A, Groves, Texas, has filed an opposition to the petition for reconsideration.

2. In its petition for reconsideration, Polk County Broadcasting refers to the "extremely high land cost" of the area west of Livingston and the cost of constructing a 500-foot tower. In order to avoid constructing this tower to effectuate its upgrade, Polk County Broadcasting requests the site restriction be deleted in order to allow it to utilize its existing tower.

3. In its opposition comments, Wilderness Broadcasting refers to the fact that the upgrade at the present Station KETX-FM site would result in a short-spacing to Station KTBC, Nacogdoches and limit its selection of transmitter sites to effectuate its proposed upgrade for Station KTFA at Groves. Wilderness Broadcasting also asserts that Polk County Broadcasting has advanced only its private economic interests in support of a waiver of the Commission's minimum spacing requirements.

4. After careful consideration of this matter, we are of the view that deletion of the site restriction would not be warranted. While it does appear that effectuating the Station KETX-FM upgrade at its existing tower would result in cost savings, these savings constitute only a private economic benefit to Polk County Broadcasting. On balance, we believe that the additional costs to Polk County Broadcasting in going forward with its upgrade as proposed are outweighed by the public interest benefits of avoiding an unnecessary short-spacing to Station KTBC and maintaining the FM Table of Allotments in compliance with the spacing requirements contained in Section 73.207 of the Rules. It should also be noted that Polk County Broadcasting is, in essence, requesting waiver of the minimum spacing requirements contained in Section 73.207(b) of the Commission's Rules to permit the allocation of a short-spaced allotment. The Commission has not granted such a waiver at the rule making stage. *See , e. g. Portland, Tennessee*, 35 FCC 2d 601 (1972); and *Toms River, New Jersey*, 43 FCC 2d 414 (1973). Furthermore, a threshold showing for a waiver request is that no fully spaced site is available. *Donovan Burke*, 60 RR 2d 110 (1986). In the present situation there is, in fact, an available site complying with the minimum spacing requirements and the economic benefits accruing to Polk County Broadcasting by using its existing tower do not constitute a compelling need for the waiver. We also do not believe that the fact Station KETX-FM, as a Class A facility, is currently short-spaced to co-channel Station KTBC Nacogdoches, justifies perpertuating the same short-spacing (100.6 instead of the required 105 kilometers) as a first adjacent Class C2 facility. The "grandfather" provision for existing short-spaced stations in the *Fourth Report and Order*, 40 FCC 868 (1964), is limited and does not provide for maintaining a short-spacing after a rule making proceeding changing a particular channel allotment.[1]

5. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Polk County Broadcasting IS HEREBY DENIED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

### FOOTNOTE

[1] In this connection, we would also note that the interfering contour for Class A Station KETX-FM, operating on Channel 221A, extends 75.9 kilometers toward co-channel Station KTBC. On the other hand, as a Class C2 facility on Channel 222C2, the interfering contour extends 78.1 kilometers toward first-adjacent Station KTBC, thus creating the potential for greater interference.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-87**

In the Matter of

Amendment of Section 73.202(b), RM-5094
Table of Allotments,
FM Broadcast Stations.
(Atlanta, Texas)

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 16, 1988; Released : April 15, 1988**

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by James A. Reeder (Reeder), licensee of Station KCOZ, Shreveport, Louisiana, directed against the *Report and Order* in this proceeding, 2 FCC Rcd 431 (1987), which substituted Channel 259C2 in lieu of Channel 257A at Atlanta, Texas and modified the licensee of FM Station KPYN, to specify operation on Channel 259C2. Ark-La-Tex Broadcasting Company, licensee of Station KPYN, filed an opposition to the petition for reconsideration and Reeder filed a reply to the opposition.

**BACKGROUND**

2. In response to the *Notice of Proposed Rule Making* in MM Docket No. 84-231 (the "omnibus proceeding), Reeder filed a counterproposal proposing the substitution of Channel 259C1 in lieu of Channel 261A at Shreveport and modification the Station KCOZ license to specify operation on Channel 259C1. The *First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985), denied this upgrade request and Reeder subsequently filed a petition for reconsideration directed against the *First Report and Order*. The Commission also denied the petition for reconsideration. *Memorandum Opinion and Order*, 50 Fed. Reg. 47391, published November 18, 1985. Thereafter, Reeder petitioned the U.S. Court of Appeals for review of the Commission action. *James A. Reeder v. FCC and USA*, Case No. 86-1045 (D.C. Cir. January 21, 1986). Inasmuch as the upgrade at Station KPYN in Atlanta conflicts with the proposed upgrade at Station KCOZ in Shreveport, the *Report and Order* in this proceeding modifying the Station KCOZ license was expressly conditioned on the outcome of that appeal.

3. In his petition for reconsideration in this proceeding, Reeder contends that the channel substitution and license modification should not have been considered during the pendency of his appeal. Accordingly, Reeder requests that the *Report and Order* be vacated and this proceeding be held in abeyance pending a final outcome of the judicial appeal. In this connection, Reeder asserts that the *Report and Order* was "premature, potentially meaningless, and could prejudice the final resolution" of the appeal.

4. In its opposition, Ark-La-Tex Broadcasting Company argues that Reeder has failed to demonstrate that a conditional allotment does not fully protect his interests. Ark-La-Tex Broadcasting Company also contends that the petition for reconsideration is, in essence, a motion for stay of the Atlanta allotment. To this end, it asserts that Reeder did not make a substantial case on the merits of his appeal and for this reason, the requested relief should be denied.

5. After careful consideration of the petition, we will not set aside or stay the action in the *Report and Order*. Reeder has not advanced any arguments pertaining to the merits of his appeal. For this reason, a stay of our action would be inappropriate. *See Washington Metropolitan Area Transit Commission v.* Hol id ay Tours, Inc., 559 F2d 841 (D.C. Cir. 1977). The arguments directed against the R eport and Ord er are not well taken. Contrary to the assertion by Reeder, our procedure of making a conditional grant is not "a waste of the time and resources of both potential petitioners and the Commission." The conditional grant enables the Commission to expeditiously close a proceeding substituting a new channel and modifying an existing license. This procedure facilitates the efficient transaction of Commission business and conserves resources which would be expended in maintaining a rule making proceeding in pending status over a prolonged period of time. We also disagree with the assertion that our action could "prejudice the final resolution of the earlier proceeding" involving an upgrade at Station KCOZ. In the event that Reeder is successful at the Court of Appeals, returning the Atlanta upgrade proceeding to pending status would, in fact, be mandated by that Court action. Ark-La-Tex Broadcasting recognizes this possibility. Furthermore, this action is consistent with our procedure in similar cases. *See e.g.* Falmouth, Kentucky, 52 Fed. Reg. 7309, published March 19, 1987.

6. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration IS DENIED and the action in the Report and Order in MM Docket No. 86-87 substituting Channel 259C2 in lieu of Channel 257A at Atlanta, Texas and modifying the license of Station KPYN, Atlanta, Texas to specify operation on Channel 259C2, conditioned on the outcome of the appeal, James Reeder v. F.C.C. and USA, Case No. 86-1045, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: April 14, 1988**

## MEETING OF THE IMPLEMENTATION SUBCOMMITTEE OF THE FCC ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE

The second meeting of the Implementation Subcommittee of the FCC Advisory Committee on Advanced Television Service will be held on April 25, 1988, in the Commission Meeting Room (Room 856) at 1919 M Street, N.W., Washington, D.C., beginning at 1:00 p.m. All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Subcommittee Chairman.

The agenda for the second meeting will consist of:

1. Introduction
2. Approval of Minutes of Last Meeting
3. Report of Working Party 1 - Policy and Regulation
4. Report of Working Party 2 - Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Meeting
8. Adjournment

For additional information, contact Implementation Subcommittee Chairman Dr. James J. Tietjen (609) 734-2237 or Mr. David Siddall (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: April 15, 1988**

## SOUTHWESTERN BELL SEEKS WAIVER OF SECTION 64.702 OF THE COMMISSION'S RULES TO PROVIDE LOOP STATUS VERIFICATION SERVICE
**Pleading Cycle Established**

On March 9, 1988, Southwestern Bell Telephone Company (Southwestern) petitioned for waiver of the *Computer II* requirements as set forth in Section 64.702 of the Commission's rules to permit Southwestern to provide Loop Status Verification Service (LSVS), an enhanced service, on an unseparated basis. LSVS provides for the continuous testing of a telephone subscriber's access line. It is used for those lines connected to remote monitoring equipment and provides automatic contact to an alarm company if an activating event such as fire, forced entry or pulled alarm occurs. Southwestern states that LSVS will be provided by an additional network component which is ancillary to the serving central office switch.

Southwestern states that a similar waiver request of the *Computer II* Rules was granted for line continuity services to Northwestern Bell Telephone Company in *Applied Spectrum Technologies, Inc.*, Mimeo No. 5532 (released July 3, 1985). It states that it is filing a waiver request, rather than a *Computer III* Comparably Efficient Interconnection (CEI) plan, because the Commission has ruled that a CEI plan is not necessary when a similar *Computer II* waiver has been authorized. Southwestern asserts that the provision of LSVS is in the public interest because (1) it will provide greater assurance of continuity of telephone lines that are heavily relied upon for safety and security reasons; (2) it may be used to scan health monitoring equipment telephone connections as well as other critical telephone connections; and (3) it represents an additional use of the network and an added service to consumers. Southwestern contends further that the potential for anticompetitive practices is minimal. Southwestern argues that the service is procompetitive because (1) it has the potential to expand the market for alarm services; (2) there would be little incentive for Southwestern to discriminate among alarm companies since all alarm companies can obtain LSVS from central offices so equipped at the same standard rate; and (3) since the additional network component needed to provide LSVS can be purchased at minimal cost, Southwestern will have little incentive to discriminate against competing manufacturers of the network component.

Parties may file comments on Southwestern's petition no later than **May 13, 1988.** Replies should be filed by May 30, 1988. Comments should refer to file number AAD 8-1918.

Copies of Southwestern's petition may be obtained from International Transcription Services, Inc., 2100 M Street, NW, Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, NW, Washington, D.C. 20054.

For further information contact Louise M. Quick, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-285**

In the Matter of

Amendment of Section 73.202(b), RM-5813
Table of Allotments,
FM Broadcast Stations.
(Boothbay Harbor, Maine)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 4589 (1987), in response to a petition filed by Bay Communications, Inc. (petitioner). The *Notice* proposed the substitution of FM Channel 244B1 for Channel 244A at Boothbay Harbor, Maine, and modification of the license for Station WCME(FM) to specify Channel 244B1 in lieu of Channel 244A. Petitioner filed comments in support of the *Notice* and reaffirmed its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 244B1 for Channel 244A at Boothbay Harbor, Maine, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements provided there is a site restriction 19.6 kilometers (12.2 miles) north of the community.[1] The site restriction will avoid a short spacing to Stations WWMR, Rumford, Maine (Channel 242C) and WCYT, Rochester, New Hampshire (Channel 244A). Since the allotment of Channel 244B1 to Boothbay Harbor is within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained. As stated in the *Notice*, the proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine.

3. We have authorized in paragraph 5, a modification of petitioner's license for Station WCME(FM), Boothbay Harbor, Maine, to specify operation on Channnel 244B1 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Boothbay Harbor, Maine | 244B1 |

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WCME(FM), Boothbay Harbor, Maine, IS MODIFIED TO SPECIFY operation on Channel 244B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for this site are 44-01-31 and 69-34-17.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-187**

In the Matter of

Amendment of Section 73.202(b), RM-5564
Table of Allotments,
FM Broadcast Stations.
(Bad Axe, Michigan)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 25, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 3488 (1987), issued in response to a petition filed by Thumb Broadcasting, Inc. (petitioner), proposing the substitution of FM Channel 271C2 for Channel 221A at Bad Axe, Michigan, and modification of its license for Station WLEW(FM), to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 271C2 for Channel 221A at Bad Axe, Michigan, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 14.7 kilometers (9.1 miles) northwest of the community.[1] The site restriction will prevent a conflict with Station WDET-FM, Channel 270B, Detroit, Michigan. The *Notice* also indicated a conflict with Channel 271C1, Brampton, Ontario, Canada. The Brampton station is now licensed at a site that does not conflict with Channel 271C2 at Bad Axe. Since Bad Axe, Michigan, is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, Canadian concurrence has been obtained. In addition, we have authorized in paragraph 4, *infra.*, a modification of the petitioner's license for Station WLEW(FM), Bad Axe, Michigan, to specify operation on Channel 271C2 in accordance with Section 1.420(g) of the Commission's Rules since no other expressions of interest have been received. *Modification of FM Broadcast Station Licenses*, 98 FCC 2d 916 (1984).

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Bad Axe, Michigan | 271C2 |

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WLEW(FM), Bad Axe, Michigan, IS MODIFIED to specify operation on Channel 271C2 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for this site are: 43-53-55 and 83-07-37.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-143**

In the Matter of

Amendment of Section 73.202(b), RM-6159
Table of Allotments,
FM Broadcast Stations.
(Cloquet and Grand Marais,
Minnesota)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 24, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is a petition for rule making filed by WKLK, Inc. (petitioner), requesting the substitution of FM Channel 263C1 for Channel 265A at Cloquet, Minnesota. Petitioner also requests modification of its license for Station WKLK-FM, to specify operation on the higher class channel. In support of its proposal, petitioner states that granting this request would result in a more efficient use of the spectrum by enabling the improvement of the existing first local FM service at Cloquet.

2. Channel 263C1 can be allocated to Cloquet, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 8.9 kilometers (5.5 miles) northeast of the community.[1] The site restriction will prevent a conflict with Station WCTS-FM, Channel 262C1, Minneapolis, Minnesota. It would also be necessary to delete Channel 263C from Grand Marais, Minnesota, to accommodate the upgrade at Cloquet. An application for Channel 263C has been filed by Timothy D. Martz (870908MK). Petitioner has proposed the substitution of FM Channel 237C for Channel 263C at Grand Marais. The proposed substitution at Grand Marais can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at the applicant's site or at the city reference coordinates.[2] Timothy D. Martz would be permitted to amend his application to specify Channel 237C and retain his cut off protection, since the channels are equivalent. Petitioner has indicated a willingness to reimburse the applicant for Channel 263C at Grand Marais for his reasonable costs associated with a channel change.

3. As for the proposed Cloquet upgrade, we shall propose to modify the license of Station WKLK-FM, to specify operation on Channel 263C1, in accordance with Section 1.420(g) of the Commission's Rules.

4. Since the communities of Cloquet and Grand Marais, Minnesota, are within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government will be required for the Allotment of Channel 263C1 at Cloquet and Channel 237C at Grand Marais.

5. In order to provide a wide coverage area station for the Cloquet, Minnesota area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Cloquet, Minnesota | 265A | 263C1 |
| Grand Marais, Minnesota | 263C | 237C |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 6, 1988,** and reply comments on or before **June 21, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Anne Thomas Paxson
Borsari & Paxson
2100 M Street, N.W.
Suite 610
Washington, D.C. 20037
(Counsel for the petitioner)

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the following:

Timothy D. Martz
187 Brookmere Drive
Fairfield, Ct. 06430

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and

shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The following coordinates are used for Cloquet Channel 263C1: 46-45-50 and 92-22-12.

[2] The reference coordinates for Grand Marais, Minnesota are 47-59-13 and 90-24-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-144**

In the Matter of

Amendment of Section 73.202(b), RM-6167
Table of Allotments,
FM Broadcast Stations.
(Larned, Kansas)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 24, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Thomas L. Higgins (petitioner), seeking the allocation of FM Channel 295A to Larned, Kansas, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 295A can be allocated to Larned, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. In view of the fact that the proposed allocation could provide a second broadcast service to Larned, Kansas, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Larned, Kansas | 244A | 244A, 295A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 6, 1988,** and reply comments on or before **June 21, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas L. Higgins
9913 Lakeshore Blvd.
Cleveland, Ohio 44108

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates used for this proposal are 38-10-48 and 99-06-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-145**

In the Matter of

Amendment of Section 73.202(b), RM-6201
Table of Allotments,
FM Broadcast Stations.
(Summerville, South Carolina)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 21, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Millennium Communications of Charleston, Inc. (petitioner), requesting the substitution of Channel 227C2 for Channel 228A at Summerville, South Carolina, and the modification of its license for Station WWWZ-FM to specify the higher powered channel. Petitioner states that the substitution of channels would serve the public interest by allowing Station WWWZ-FM to expand its coverage and thus improve service to the surrounding area.

2. Channel 227C2 can be allocated to Summerville in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.7 kilometers (14.7 miles) northeast to avoid a short-spacing to Station WEAS-FM, Channel 226C1, Savannah, Georgia.[1] As requested, we shall also propose to modify the license of Station WWWZ-FM to specify Channel 227C2. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, modification of Station WWWZ-FM's license may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties. *See , Report and Order*, MM Docket No. 85-313, 51 FR 20290, June 4, 1986.

3. We believe the public interest would be served by proposing the substitution of Channel 227C2 for Channel 228A at Summerville, South Carolina, since it could provide the area with expanded FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Summerville, South Carolina | 228A | 227C2 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 6 1988,** and reply comments on or before **June 21, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan C. Campbell, Esq.
Elizabeth J. Gustafson, Esq.
Dow, Lohnes & Albertson
1255-23rd Street, N.W., Suite 500
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are: North Latitude 33-11-17; West Longitude 80-01-27.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-435**

In the Matter of

Amendment of Section 73.202(b), RM-5840
Table of Allotments,
FM Broadcast Stations.
(Lehigh Acres, Florida)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: April 5, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6319 (1987), proposing to substitute Channel 296C2 for Channel 296A at Lehigh Acres, Florida, at the request of Dwyer Broadcasting, Inc. (petitioner), licensee of Station WOOJ-FM, Channel 296A Lehigh Acres. In addition, the *Notice* proposed to modify the station license to specify Channel 296C2. Petitioner filed comments and reply comments.

2. In comments to the *Notice*, petitioner restated its interest in upgrading Station WOOJ-FM to a Class C2 facility. In its reply comments, petitioner noted its awareness of a petition for rule making filed by Gator Broadcasting Corporation and Monroe Television, Inc., proposing to modify the license for Station WGGG(FM) (Channel 249A), Micanopy, Florida, to Channel 247C2, and to substitute Channel 300C2 for unused Channel 247A at Chiefland, Florida. The proposed upgrades at Micanopy and Chiefland are not in conflict, and thus, have no impact of the Lehigh Acres rule making.

3. We believe that the public interest would be served by substituting Channel 296C2 for Channel 296A at Lehigh Acres, which would provide for expanded FM service to that area. The allotment can be made in compliance with the minimum distance separation requirements. As stated in the *Notice*, petitioner proposes to relocate its transmitter at a site 28.8 kilometers (17.9 miles) south of the city.[1] In addition, we shall modify the license of Station WOOJ-FM to specify operation on Channel 296C2 pursuant to Section 1.420(g) of the Commission's Rules. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Lehigh Acres, Florida | 296C2 |

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WOOJ-FM, Lehigh Acres, Florida, IS MODIFIED to specify operation on Channel 296C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] Coordinates for Channel 296C2 at this restricted site are 26-22-08 and 81-40-29.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-118**

In the Matter of

Revision of Section 73.3573(a)(1)
of the Commission's Rules
Concerning the Lower Classification
of an FM Allotment.

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 11, 1988; Released: April 15, 1988**

By the Commission:

## INTRODUCTION

1. The Commission, on its own motion, hereby proposes to revise Section 73.3573(a)(1) of the Rules regarding requests to reclassify an FM allotment to a lower class (downgrading).[1] This type of request affects both vacant and occupied channels. Currently, in order to reclassify an existing FM allotment to a higher or lower class, Section 73.3573(a)(1) requires that the FM Table of Allotments be amended by filing a petition for rule making. Thereafter, a party wishing to operate facilities at the new class would file an application. We propose to eliminate the rule making proceeding requirement for requests to downgrade and allow downgrading of channel class merely by filing an application.[2] Once the application is granted, the Table of Allotments would be amended accordingly. [3]

## BACKGROUND

2. Downgrading can be desirable in the context of either a vacant allotment or an existing FM station. For example, both existing stations and applicants filing for new Class C FM stations must meet the separation criteria and the minimum antenna height and power criteria set forth in our rules. For various reasons, such as the inability to meet FAA requirements, zoning or competitive reasons, or the desire to use an existing structure at a site not complying with the separation criteria, an applicant for a new station occasionally may not be able to secure an acceptable site. If the applicant could specify a lower class (C1, C2 or A) with lesser separation requirements, it could have a greater pool of potential sites from which to choose. With regard to existing structures, occasionally an applicant is unable to attain the minimum antenna height for a Class C channel. Once again, specifying a lower class with a prescribed lower minimum antenna height would be a solution. Further an applicant might also determine that the higher class is either unnecessary or not economically viable.

3. FM channels are allotted in the FM Table of Allotments by rule making. Consistent with Commission technical requirements, the channel number and its class are established in the rule making proceeding. The rule making process is designed so that it considers competing requests for spectrum use more efficiently than the application and hearing process pursuant to Section 307(b) of the Communications Act of 1934, as amended. Where a new channel or higher class of channel is proposed, spectrum use up to 180 miles can be affected. Therefore, the opportunity for others to request conflicting FM uses arises. However, where the class of an existing channel is to be downgraded, no additional spectrum is used. Therefore no conflicting proposal requiring a Section 307(b) evaluation could be tendered.

4. Prior to 1984, Section 73.206 of the Commission's Rules provided for only two classes of channels in each of the three zones of the country. (Zone I or IA – Class A or B; Zone II – Class A or C). The process for downgrading the class of an FM channel was to file a rule making petition. In each zone, there were only two classes of channels, with a large gap in facilities between them. A check of our records does not show that requests to downgrade were ever made, possibly because the reduction in facilities would be so great.

5. In BC Docket No. 80-90, the Commission created additional classes of channels. *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983); recon. 97 FCC 2d 279 (1984). Docket No. 80-90 provided that Class B and Class C stations that did not operate with prescribed minimum facilities would be automatically downgraded *(e.g.* Class C to Class C1) on March 2, 1987. As part of the implementation of Docket No. 80-90, applicants with licenses or construction permits in existence on March 1, 1984 were given until March 2, 1987, to file a minor change application to effectuate a downgrade. *Amendment to Classify Certain Changes in Television and FM Facilities*, 49 Fed. Reg. 32586, published August 15, 1984. This application procedure proved successful. We found that the issues considered were more quickly resolved by the application process. The types of issues that arose during the application process were directed to specific application proposals rather than the actual channel allotted in the rule making proceeding. The types of issues considered were similar to proceedings involving applications for service area changes.

## DISCUSSION

6. *Existing Stations*. In the case of existing FM stations desiring to downgrade their class of channel, we note that during the three year period (March 1984 to March 1987), referred to in paragraph 5, *supra*, many FM stations chose to accept lower class facilities by filing an application. The application for the change in facilities was a minor change not subject to mutually exclusive proposals. This procedure was successful and, most importantly, the public benefitted from this expedited review provided by the application process. For these reasons, we tentatively believe that the application by existing stations to downgrade their channel should be considered a minor modification of license.

7. We propose that existing stations would specify the downgrade in class in the application to modify facilities. The modification of facilities could involve a reduction in power, a reduction in antenna height and/or change in transmitter site. A reduction in power or antenna height by itself does not have any preclusive effect with respect

to other applications or rule making petitions. On the other hand, a change in transmitter site could conceivably involve a conflict with a pending application or rule making petition. It is our view that these conflicts and any other matter which may arise in these modifications can be processed in accordance with existing application policies and procedures. We do not perceive of any public interest benefit in first having a rule making proceeding to downgrade the allotment because a change in transmitter site is involved. Both the public and the stations would benefit from the expedited review provided by the application process.

8. *Vacant Channels.*[4] As a result of our action in MM Docket No. 84-750, FM allotments are initially available for application during a "filing window" period. *FM Application Processing*, 58 RR 2d 776 (1985). These windows are established in the rule making action. In the case where the filing window closes without the filing of an application, allotments are then available on a "first-come/first-serve" basis. In that situation, the first acceptable application for the allotment will cut-off the filing rights of subsequent applications. In both instances, the applicant may only apply for the channel and class set forth in the Table. Where no acceptable applications are received at the expiration of the filing window period, any potential applicant desiring lesser facilities than that of the specified class must file a rule making petition. Although this process occurs infrequently, the rule making appears to be unnecessary since, as noted earlier, no additional spectrum use is contemplated. We note that persons interested in applying for the original allotment have an opportunity to do so during the window period and very few allotments remain vacant after that period. On the basis of this experience, we believe it is appropriate to allow these channels to be available for lower class use at the first-come/first-serve stage. The usual reason for applicants to wait and apply for the lower class are site availability problems or economic viability concerns for the higher class. In both situations, the lower class facility may be more attractive. Accordingly, after the filing window closes, we propose to process applications on the "first-come/first-served" basis regardless of the class specified, as long as it meets the basic requirements for applications.

9. Therefore, we believe that the public interest is advanced by providing applicants the flexibility to operate a channel at the lower class. That benefit can be accomplished more expeditiously by allowing interested persons the opportunity to apply after the window closes than by retaining the original class indefinitely.

10. In our efforts to expedite service to the public and minimize any burden to the applicant, we are mindful that any procedure adopted must be fair to all parties. Our concern in this situation would arise where mutually exclusive petitions for rule making are filed proposing FM channels to different communities. In the event that one of the petitioners proposes a higher class of channel, that petitioner may prevail in the comparative rule making proceeding. We would be concerned if this petitioner or another applicant would then file an application proposing the channel at the lower class. This would appear to be unfair to both the other petitioner and the other community which may have otherwise prevailed in a comparative rule making proceeding involving two channels of the same class. In view of this concern, we are requesting comment on the need to adopt a specific procedure to deal with this type of situation or merely reserve the right to take appropriate action on a case-by-case basis.

11. As stated earlier, we propose to amend the Table of Allotments upon grant of the construction permit for vacant channels. Once the permit is granted, we shall no longer protect the original allotment at the reference point. Rather, we shall process other applications and petitions based upon the lower class channel. *See* Section 73.208(b)(1) and (2) of the Commission's Rules. Should the permit be revoked at a later date, under this proposal the downgraded class would be retained in the Table. Nevertheless, we believe that after grant of a construction permit to modify the facilities of an *existing* FM station to a lower class, we should continue to protect the licensed operation. That protection would continue until the modified facilities are licensed. The permit would also be protected as is currently done in cases where a site change is granted. *See* Section 73.208(b)(1) and (2). Commenters may wish to address this issue as to the appropriate time to remove the protection of the higher class channel.

## CONCLUSION

12. In view of the foregoing, we propose the revision of Section 73.3573(a)(1) of the Rules to permit the downgrading of the class of an FM allotment to be effectuated by application. This would eliminate the rule making step in our current procedure to effectuate a downgrade. It is our initial view that this step is unnecessary, time-consuming, and a burden to the petitioners and the Commission staff. Our proposed procedure would benefit the public by expediting the institution of new service. Therefore, we seek comments concerning this revision, the issues which could be raised in connection with an application to downgrade either a vacant or occupied channel and whether the resolution of such issues could be better accomplished in rule making proceedings.

13. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. *Reason for Action* :

This action simplifies the procedure to effectuate the downgrading of the class of an FM allotment.

II. *The Objective* :

Through this proceeding, the Commission proposes to eliminate the requirement that a party wishing to downgrade the class of an FM allotment first file a petition for rule making.

III. *Legal Basis* :

Sections 4 and 303 of the Communications Act of 1934, as amended.

IV. *Description, potential impact, and number of small entities affected* :

This proposal would enable potential applicants and existing stations to effectuate a downgrade in class by merely filing an application without the need to first file a petition for rule making.

V. *Recording, record keeping, and other compliance requirements* :

None.

VI. *Federal rules which overlap, duplicate or conflict with this rule* :

None.

VII. *Any significant alternatives minimizing impact or small entities consistent with the stated objective* :

None.

14. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

## PAPERWORK REDUCTION ACT STATEMENT

15. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement and will not increase or decrease burden hours imposed on the public.

## EX PARTE CONSIDERATIONS

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases a final order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

17. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 6, 1988,** and reply comments on or before **June 21, 1988** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W.

18. For further information regarding this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] The Commission authorizes six classes of FM allotments (from lowest to highest) - A, B1, B, C2, C1 and C. *See* Section 73.206 of the Commission's Rules.

[2] Section 73.3573(a)(1) will still require a petition for rule making to upgrade or create a new channel.

[3] This proposal would not apply if the channel number or community of allotment would change in the context of a downgrade request. In such cases, the rule making proceeding would still be required.

[4] As one aspect of the *Notice of Proposed* Rule Making in MM Docket No. 86-144, 51 FR 15927, published April 29, 1986, we proposed to allow an applicant for a vacant FM allotment to downgrade the class of the allotment after the filing window has closed by filing an application specifying the channel at a lower class. We believe that it is advisable to consider the downgrading of vacant allotments and existing stations in the same proceeding. Therefore, we are no longer considering that proposal in the context of MM Docket 86-144. Rather, we believe the proposal is more appropriately considered in this separate proceeding where all comments will be directed toward the issue of downgrading.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Neptune Beach and Green
Cove Springs, Florida)

## MEMORANDUM OPINION AND ORDER

**Adopted: March 11, 1988; Released: April 15, 1988**

By the Commission:

1. The Commission has before it the Application for Review filed by Willis and Sons, Inc. (Willis), licensee of FM Station WSVE, Channel 224A, Green Cove Springs, Florida, directed against an action by Chief, Allocations Branch which returned by letter its petition for rule making. That petition proposed (1) the reallotment of Channel 224A from Green Cove Springs, Florida, to Neptune Beach, Florida, and (2) modification of the Station WSVE license to specify Neptune Beach.

## BACKGROUND

2. In returning the petition for rule making, the staff determined that it could not approve the modification of license to specify Neptune Beach without allowing other potential applicants an opportunity to apply for the channel at the new community, citing *Riverside and Santa Ana, California*, 65 FCC 2d 920 (1977), *recon. denied*, 68 FCC 2d 557 (1978). Since Willis expressed no interest in the reallotment without the concomitant modification of its license, the petition was returned.

3. In support of its Application for Review, Willis contends that there is no provision in any rule or statute that requires a licensee to risk its license when it seeks to change to a new community of license. Willis disputes the staff's reliance on *Riverside and Santa Ana, supra*, in which the Commission held that it would not reallot UHF Channel 40 from Riverside, California to Santa Ana, California and modify the existing license to specify Santa Ana without entertaining competing applications. In this regard, Willis argues that the Commission's 1986 action in *FM License Upgrading*, 60 RR 2d 115 (1986), in effect, modified the earlier *Riverside and Santa Ana* decision.[1] As a result of the 1986 action, we now permit the modification of an FM license to a new channel in the same community without accepting competing applications. This procedure would occur where the existing channel precludes the proposed use of the new channel by any other parties. By analogy, Willis argues that its proposal is within the ambit of *FM License Upgrading, supra*, because its current Channel 224A operation in Green Cove Springs precludes the use of Channel 224A in Neptune Beach.

## DISCUSSION

4. After careful consideration of this matter, we affirm the staff action. In its Application for Review, Willis has not demonstrated that the staff action is erroneous or in conflict with Commission precedent or policy. *See* Section 1.115 of the Commission's Rules.

5. As a background to this matter, in FM and television broadcasting, both the community of license and the channel number are determined by rule making. In accordance with Commission responsibility under Section 307(b) of the Act, interested parties may submit counterproposals in the rule making proceeding proposing a different community of license. All Section 307(b) issues are concluded in the rule making proceeding. Once the channel is allotted to the particular community in the Table of Allotments, an applicant may only specify the community listed in the Table.[2] The second step in the licensing process is to determine the best qualified licensee at the particular community on the basis of an application.

6. Our action in *FM License Upgrading* did not modify the action in *Riverside and Santa Ana*. The *FM License Upgrading* and *Modification of FM and TV Station Licenses* decisions apply to existing stations attempting to increase their coverage areas. No change in the community of license is contemplated. On the other hand, the *Riverside* case applies to stations seeking to change the city of license. Furthermore the upgrading proceedings were considered on an overall basis whereas Willis here seeks to have us consider a change in the Commission's process on an ad hoc basis. Thus we conclude that the Commission did not modify its *Riverside* and Santa Ana decision and that case continues to represent the Commission's policy in this area.

7. Accordingly, IT IS ORDERED, That the aforementioned Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] Although not cited by Willis, the same argument would be applicable to our earlier action in Modification of FM and TV Station Licenses, 98 FCC 2d 916 (1984), wherein the Commission determined that it will upgrade a channel in a particular community when there is another equivalent channel in that community to accommodate other expressions of interest.

[2] When the Table is amended to specify a new community, this is, in essence, a new allotment and represents the first and only opportunity (except for filing against the renewal application) to apply for the allotment.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-112**

In the Matter of

Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators — RM-5219

## REPORT AND ORDER

**Adopted: March 24, 1988; Released: April 15, 1988**

By the Commission:

### INTRODUCTION

1. By this action, the Commission is adopting changes to its rules to allow noncommercial educational FM translator stations assigned to reserved channels and owned and operated by their primary stations[1] to receive signals for rebroadcast via any technical means the licensee deems suitable.[2] The revised rules will permit use of signal delivery means that include, but are not limited to, satellite and terrestrial microwave facilities. Moody Bible Institute of Chicago (Moody) first sought authority to allow such translators to be fed by means other than direct over-the-air reception in a Petition for Rule Making filed on October 31, 1985.[3] The Commission accepted their petition and commenced a Rule Making proceeding in *Notice of Proposed Rule Making* in MM Docket No. 86-112, 104 FCC 2d 318 (1986). On the basis of the record developed in response, the Commission concludes that use of alternative signal delivery methods by noncommercial educational stations as specified above would serve the public interest by facilitating improvements in the quality of signals they rebroadcast and enabling such stations to reach larger numbers of listeners who desire noncommercial educational service, including populations residing in more remote areas. We also find that this rule change is consistent with our policy authorizing translators as a secondary service for reaching areas and populations unable to receive satisfactory FM service because of distance or intervening terrain obstructions.[4]

### BACKGROUND

2. The FM translator service was instituted in 1970 as a means to supplement the primary service provided by full facility FM stations.[5] While the Commission recognized the benefits which would be derived from the translator service, it was concerned about the use of translators as a means to expand competitively the service area of a primary FM station. Consistent with these objectives and concerns, the Commission authorized FM translators for the specific and limited purposes of providing FM radio service to underserved areas, extending additional FM service to underserved areas, and improving service to areas within the predicted 1 mV/m contours of primary FM stations. To ensure that translators are used only for these limited purposes, licensees of commercial FM stations are restricted from owning translators beyond their 1mV/m contour and within the 1mV/m contour of another commercial station assigned to a different principle community.[6] The Commission found there to be less potential for harm to full service noncommercial stations from competition by noncommercial translators and therefore did not impose ownership restrictions on noncommercial translators. As part of these rules, the Commission restricted both commercial and noncommercial FM translators to rebroadcast of signals received directly over-the-air from their primary stations or another translator.[7]

3. In its petition, Moody proposed that the Commission permit noncommercial educational FM translators to rebroadcast signals delivered via satellite and terrestrial microwave facilities. It also proposed that the authority to use such facilities be limited to noncommercial FM translators that are assigned to reserved channels (Channels 200-220) and owned and operated by the noncommercial primary station to be rebroadcast.

4. In support of its proposal, Moody stated that use of satellite and microwave facilities would allow delivery of superior quality input signals to noncommercial translators and thereby improve the quality of the signals that are rebroadcast. In this regard, Moody stated that signals delivered by these means could be distributed to more remote locations, thus extending service to underserved areas. It also submitted that such alternative distribution systems would eliminate the need for expensive, cumbersome antenna systems, and that the savings so realized could be used to enhance programming services. It further indicated that the additional translator stations that its proposal would make possible would add to the diversity of voices available to radio listeners. Finally, Moody stated that this proposal would be consistent with the Commission's overall goals regarding service by noncommercial educational translators.

5. In response to Moody's petition, we adopted a *Notice of Proposed Rule Making* (*Notice*) on April 3, 1986, 51 FR 15026 (April 22, 1986), to consider the proposed changes to our FM translator rules. In the *Notice*, we stated that consideration of the proposed use of satellite and terrestrial microwave facilities as alternative input signal delivery methods for noncommercial educational FM translators was appropriate at that time because the radio proceedings in Docket Nos. 80-90, 84-231 and 20735, which had been pending in 1984 when we considered Moody's earlier petition, are now complete.[8] We also stated that it appeared that this proposal would not impede the growth of full service radio stations since noncommercial educational translators would continue to be authorized only on a secondary, non-interference basis. In addition, we stated that we did not intend to change our policy requiring translators to rebroadcast simultaneously a specific parent station and that we would not permit the establishment of a network of only translators. In response to the *Notice*, the Commission received twenty comments, seven reply comments and approximately 1,300 informal comments.[9]

## COMMENTS

6. Five commenting parties and the parties filing informal comments fully support the proposed rule changes.[10] These parties generally agree with Moody's initial position that use of satellite and microwave facilities to feed noncommercial educational translators would permit translators to provide higher quality service, would increase needed translator service in unserved and underserved areas and would enhance program diversity. In this regard, the Oregon Commission on Public Broadcasting (OCPB) submits that many FM translators experience significant over-the-air reception problems which limit their ability to deliver a high quality signal to the intended audience. OCPB cites temperature inversion, multipath distortion and co-channel and adjacent channel interference among the problems often experienced. Additionally, Southwestern Adventist College believes that the cost effectiveness of a particular means of delivering an input signal depends on the geographic characteristics of the areas to be served and, thus, translator operators should have the flexibility to choose from among off-the-air, satellite and microwave systems. Columbia Union College Broadcasting, Inc. suggests classifying those translators fed via satellite or microwave as secondary to those that rebroadcast signals received directly off-the-air. Thomas W. Read believes that FM translators should be allowed to use the best technical method available to receive the signal of the primary station and should not be limited to microwave and satellite technology, as suggested in the Moody petition. Rather, Read suggests, the Commission should authorize translators to utilize alternative technologies, such as telephone lines and fiber optics, for example, so that translators can receive the best possible technical signal from the primary station.

7. In addition to adoption of the changes set forth in the *Notice*, the Association of Maximum Service Telecasters (MST) recommends the adoption of minimum Channel 6 protection standards to be used in conjunction with the general provision that translators are authorized only on a non-interference basis.[11] MST states that the use of such standards at the application stage would help avoid costly administrative and litigation expenses arising out of protracted interference disputes.[12]

8. Three commenters representing public radio interests support the use of microwave facilities for noncommercial translator input signal delivery, but oppose use of satellite systems.[13] Their principal concern is that use of satellite technology to deliver signals to translators would encourage centralization in broadcasting to the detriment of localism. They argue that while microwave facilities are technically limited to relaying signals to nearby communities, satellites are unsuitable for such local or intrastate regional use. These parties also assert that satellites are far more costly than microwave facilities and, thus, cannot be used to provide economical service except over large and distant areas.

9. The majority of the thirteen opposing commenters are licensees of commercial radio stations broadcasting religious program formats.[14] They generally believe that use of satellite and microwave facilities as input signal delivery systems for noncommercial FM translators would fundamentally alter and undermine the purposes of the FM translator service by permitting the establishment of *de facto* networks of FM "superstations" or "satelators". These commenters believe that the expanded input signal delivery authority proposed for noncommercial translators would adversely affect the viability of commercial religious format stations and the principles of localism and diversity in broadcasting. They assert that this proposal would unfairly discriminate against commercial religious format stations which broadcast programming nearly identical to that of noncommercial religious format stations and the Moody Satellite Network.

10. Several opposing parties, including the National Association of Broadcasters (NAB), believe that the proposed rule change would undermine the Commission's efforts to provide service by primary FM stations and to promote the use of higher-powered noncommercial full service stations capable of serving wide geographic areas and large populations. Several of these parties also believe that to allow noncommercial translators to use alternative input signal delivery systems would substantially increase interest in the reserved channels, resulting in a flood of new applications. They state that this would severely burden the Commission's limited resources and delay the processing of "legitimate" translator, as well as full service station, applications. In this regard, these parties are particularly concerned that the initiation of new primary service pursuant to Docket Nos. 80-90 and 84-231[15] would be delayed to the detriment of the public interest. In addition, with regard to the proposal to allow translators to make use of broadcast auxiliary facilities, NAB asserts that aural intercity relay channels already are congested in many parts of the country and that full service stations should not have to compete with FM translators for this spectrum.

11. In its reply comments, Moody initially asserts that the informal comments filed by more than 1,000 parties is a message to the Commission that significant portions of the country are underserved by noncommercial FM stations. It thus believes there is an immediate and existing need for the services that its proposal would permit. As to the arguments regarding competition between noncommercial educational formats and commercial religious formats, Moody asserts that an examination of program content can play no role in the Commission's evaluation of the issues raised in this proceeding. Moody further asserts that the principle of "localism" would not be adversely affected by adoption of its proposal because translators would be used primarily as a means of enhancing service to unserved and underserved areas. Moody argues that while "translator service will never supplant the need for listener support for stations providing local news and information", a signal received from a translator is preferable to no signal at all.

12. Similarly, Moody states that because translators would continue to operate on a secondary basis to full service stations, allowing them to use satellite and microwave facilities for input signal delivery would not result in their consuming the reserved spectrum or hinder the establishment of new full service noncommercial stations. Rather, Moody asserts that because there are communities which may not be capable of supporting a full service station, the existence of a translator signal, enhanced by microwave or satellite feed, will only serve to increase the diversity of voices available to those communities.

## DISCUSSION

13. Upon consideration of the proposal as set forth in the *Notice* and examination of the comments submitted thereon, we conclude that it is both useful and desirable to permit noncommercial FM translators assigned to reserved channels and owned and operated by their parent stations to use means for delivery of their primary station's signal other than over-the-air reception. This rule change will permit extension of noncommercial FM radio service to unserved and underserved areas and will facilitate improvement in the service provided by many existing noncommercial FM translators. We also see no need to limit the specific technology that can be used to satellite and microwave systems. Rather, we agree with Thomas Read's comments on this issue and find it is more desirable to provide these translator licensees full discretion to choose the means of input signal delivery most suitable to their particular circumstances.

14. The existing restriction on the means of signal delivery to noncommercial FM translators limits the potential service areas that can be reached by primary noncommercial FM stations. In this respect, the range of line-of-sight reception of over-the air signals with normal equipment is limited in most cases to areas not much beyond the predicted service area of the primary station. As Moody indicates, reception at greater distances requires expensive antenna systems, and even with such systems, is often unsatisfactory due to weather conditions and interference from other signals. Translators may, of course, be used to provide service at greater distances if the primary signal is relayed through other translators. However, the areas that can be reached through this method of signal delivery are limited to places within the range of other translators[16] and signals relayed through other translators generally suffer some deterioration in quality.

15. We find that elimination of the signal delivery restriction for noncommercial educational translators will benefit the public by expanding opportunities for providing quality FM service to unserved and underserved areas. In this respect, the rule change we are adopting will facilitate improvement in the quality of signals rebroadcast by many existing noncommercial FM translators and will allow noncommercial FM service to reach many remote areas for the first time.

16. We also find the limited relaxation of this restriction for noncommercial educational translators will not adversely affect the public interest objectives embodied in our current FM translator policy. Initially, we observe that the Commission has never specifically restricted the range over which a primary noncommercial station can provide service through translators. As discussed by some commenting parties, we recognize that, theoretically, new translators could pose some additional competition to full service noncommercial stations in the absence of the over-the-air signal delivery rule. However, it is not at all apparent that any resulting competition would have an adverse impact on local full service noncommercial stations or would cause a net loss of service to listeners. In this respect, commenters have not provided any evidence indicating specific harms from extensions of service contemplated under the proposed rule change and there is no indication that there has been any harm to noncommercial stations from existing translators. Moreover, the degree of competition for audiences and resources in the noncommercial broadcast services traditionally has been low and we do not expect this rule change to raise the level of competition there.

17. In the *Notice* we noted that "[a]" network of only translators would not be permitted."[17] We are aware of the likelihood that translator networks might be created as a result of the rule changes adopted herein. However, after careful consideration of the comments filed in this proceeding, we believe that such networks would not be inimical to the fundamental nature of the noncommercial educational FM translator service. As stressed by many commenters, the rule changes adopted in this Report and Order will facilitate the provision of noncommercial educational radio to unserved and underserved areas and improve service by existing noncommercial translators. Existing restrictions on the permissible means of signal delivery limit both the area which can be served and the quality of the signal that can be received by the public. The new rules adopted herein will allow improved service but will not change the fundamental nature of the translator service. In this respect, noncommercial educational translators are already allowed outside the 1mV/m contour of their primary station. In addition, as many commenters point out, noncommercial educational FM translators will still be secondary, restricted to the rebroadcast of a primary station. Moreover, we disagree with opposing commenters' position that the new rules will permit noncommercial FM translators to be used in a manner that would undermine our efforts to promote the operation of full service FM stations. The new rules will in no way alter the secondary status of noncommercial FM translators that would be served by alternative signal delivery means or the requirement that they "give way", *i.e.*, that the translator operator resolve the conflict or cease operation of the translator, when in conflict with a full service station.

18. As we observed in the *Notice*, the rule making and policy development tasks associated with Docket Nos. 80-90 and 84-231 that caused us to delay consideration of FM translator issues have now been completed. We note here that, in conjunction with our comprehensive review of our FM translator policy, we are imposing a general freeze on new translator applications until the issues addressed in that proceeding are resolved.[18] However, we are providing an exception to the general freeze on translator applications to permit the filing of applications for new noncommercial, educational FM translators seeking assignment to the reserved frequency band (channels 200-220). This will permit the implementation of the noncommercial signal delivery technology rule change we are making today. We also will permit the filing of applications for stations that would be mutually exclusive with an application that is exempt from the freeze. In such cases, the completing application will also be exempt from the freeze.

19. In order to facilitate the implementation of this rule change, we also are amending Section 74.1250 of our rules pertaining to FM translator transmitters and associated equipment as contemplated in the *Notice*.

20. In the *Notice*, we also proposed to modify our rules to allow broadcast auxiliary intercity relay microwave stations to be used to deliver signals to noncommercial translators.[19] This proposal was intended to facilitate the basic objective of this proceeding to permit such translators to be served by alternative signal delivery technologies. In considering this issue, we observe that the broadcast auxil-

iary frequencies are already congested in many areas, particularly in the larger markets. The additional demand for channel space on these frequencies that results from authorizing their use with noncommercial translators could impede the use of broadcast auxiliary facilities for their primary purpose, *i.e.*, delivery of program material for broadcast by full service broadcast stations. However, it is also likely that broadcast auxiliary channel space will be available in the remote areas that many new noncommercial translators would serve through the authority adopted herein.

21. We believe that the most desirable way to maximize the availability of broadcast channel space for full service station use and still provide for use of these frequencies with noncommercial translators may be to authorize the use of broadcast auxiliary channels for use with noncommercial FM translators on a secondary basis. A secondary authorization would provide that broadcast auxiliary channels could be used to deliver signals to noncommercial translators where such use would not interfere with use of those channels to serve full service stations. This would be similar to the secondary authority we recently provided for use of broadcast auxiliary channels in conjunction with FM booster stations in MM Docket No. 87-13.[20] We wish to obtain additional comment on this approach before applying it to use of broadcast auxiliary channels with noncommercial translators and therefore have raised this issue in the Further Notice in this proceeding.[21] On this basis, we will not amend our broadcast auxiliary rules regarding this issue herein.

22. We do not wish to delay the initiation of new noncommercial translator service made possible by the rule changes adopted herein where the new translator would need to use one or more broadcast auxiliary intercity relay stations. Accordingly, we will accept applications for intercity relay stations on broadcast auxiliary channels to be used to deliver primary station signals to noncommercial stations owned and operated by their primary station licensee consistent with a secondary authorization as proposed in the Further Notice. Any such authorizations granted in the interim period would be subject to the provisions of our final decision.

## PROCEDURAL MATTERS

23. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is:

I. *Reason for Action* : The Commission concludes that it is useful and desirable to adopt the proposed changes to the permissible input signal delivery authority for noncommercial translators. The Commission also finds that to allow noncommercial translators to be fed via satellite and terrestrial microwave facilities is consistent with its longstanding policy of authorizing FM translators as a means to supplement the service provided by primary FM stations.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result* :

**A.** ***Issues raised*** **:** No issues were raised specifically in response to the initial regulatory flexibility analysis. However, in its comments, the Rocky Mountain Corporation for Public Broadcasting (RMCPB) opposed the proposal to allow the use of satellites to feed noncommercial translators on the grounds they are extremely expensive and, thus, can cost effectively be used only on a national "networking" scale. In this regard, RMCPB expressed concern that in the long run diversity might be harmed by the substantial increase in use of the reserved spectrum by satellite-fed translators, to the detriment of the establishment of full service and translator stations owned by local, in-state entities, particularly small entities lacking the financial resources to use satellite facilities.

**B.** ***Assessment*** **:** The Commission does not agree with RMCPB that the use of satellites to feed translators would create opportunities to establish networks to the detriment of localism or that additional translators will occupy reserved spectrum to the detriment of local stations. As explained above, the limited rule change we are adopting herein does not alter our longstanding policy of only allowing FM translators to rebroadcast the signals of a specific primary station. Further, the new rule will not affect the availablity of spectrum space for full service stations in that it will not alter the secondary status of translators or the requirement that they "give way" when in conflict with a full service station. Finally, the limited nature of the relaxation of the signal delivery rule change is not expected to result in a significant number of new translators and therefore is not expected to significantly affect the availability of opportunities for local FM stations.

**C.** ***Changes made as a result of such comments*** **: None.**

III. *Significant alternatives considered and rejected* : The significant alternatives to the proposal to allow the use of satellite and microwave facilities to deliver input signals to noncommercial translators were to: 1) retain the rule in its current form; 2) modify the rule in accordance with the proposal to allow the use of either satellite or microwave facilities; or, 3) modify the rules to permit licensees of such translators full discretion in the choice of the technical means of signal delivery. The Commission concludes that the most desirable policy is to provide licensees of nonconnercial translators assigned to reserved channels and owned and operated by their primary stations full discretion to choose the signal delivery technology most suitable to their particular circumstances.

24. The rule changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours imposed on the public.

25. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Part 74 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B below, effective **May 31, 1988.**

26. IT IS FURTHER ORDERD that applications for use of broadcast auxiliary facilities in conjunction with delivery of signals to noncommercial FM translator stations operating on reserved channels and that are owned and operated by their licensee of their primary station WILL BE ACCEPTED consistent with the interim procedures set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## APPENDIX A

**Parties filing formal comments**

Association of Maximum Service Telecasters, Inc.
Communicom Corporation of America
Evangel Christian School, Inc.
Furniture City Broadcasting Corporation, et al.
Intercollegiate Broadcasting System, Inc.
KBLE AM, Inc.
KRXV, Inc.
Moody Bible Institute of Chicago
National Association of Broadcasters
National Public Radio
Northern Michigan University
Olympic Broadcasters, Inc.
Oregon Commission on Public Broadcasting
Rocky Mountain Corporation for Public Broadcasting
Rocky Mountain Public Radio, Inc.
Salem Broadcasting Services
Satellite Radio Network
Thomas Wilmot Read
Universal Broadcasting Corporation
WDAC Radio Company

**Parties filing reply comments**

Association of Maximum Service Telecasters, Inc.
Columbia Union College Broadcasting, Inc.
Moody Bible Institute of Chicago
Oregon Commission on Public Broadcasting
Rocky Mountain Corporation for Public Broadcasting
Southwest Adventist College
Universal Broadcasting Corporation

## APPENDIX B

**Part 74 of Title 47 of the Code of Federal Regulations is amended to read as follows:**

1. The authority citation for Part 74 continues to read as follows:

**Authority: 47 U.S.C. 154 and 303.**

2. 47 CFR 74.1231 is amended by revising paragraph (b) to read as follows:

**§74.1231 Purpose and permissible service.**

* * * * *

(b) Except as set forth in paragraphs (f) and (g) of this section, an FM translator may be used only for the purpose of retransmitting the signals of a primary FM broadcast station or another translator station which have been received directly through space, converted, and suitably amplified. However, a noncommercial educational FM translator station operating on a reserved channel (Channel 200 to 220) and owned and operated by the licensee of the primary noncommercial educational FM station it rebroadcasts may use alternative signal delivery means, including, but not limited to, satellite and microwave facilities.

* * * * *

3. 47 CFR 74.1250 is amended by revising paragraph (a) to read as follows:

**§74.1250 Transmitters and associated equipment.**

(a) FM translator and booster transmitting apparatus used by stations authorized under the provisions of this subpart may only use transmitting apparatus that has been type accepted for such use in accordance with Subpart J of Part 2. Translator stations authorized for transmitter output power of 10 watts also may use FM broadcast transmitters notified or type accepted to operate with an output power not exceeding 10 watts under the provisions of Part 73 of the Rules for broadcast stations.

* * * * *

## FOOTNOTES

[1] A "primary station" is the full service FM station retransmitted by a translator.

[2] In a separate action today, we are adopting a Further Notice of Proposed Rule Making in this proceeding to consider allowing *all* noncommercial FM translators assigned to reserved channels to receive signals by the same means we are authorizing herein for licensee-owned and operated noncommercial educational facilities. *See Further Notice of Proposed Rule Making* in MM Docket No. 86-112, FCC 88-126, adopted March 24, 1988.

[3] Moody had previously petitioned the Commission on May 21, 1981, to amend its rules to permit expanded service for all FM translators. That petition was denied in *Memorandum Opinion and Order* in Docket No. 19918, 98 FCC 2d 35 (1984).

[4] In a separate action today, we are initiating a proceeding to undertake a comprehensive reexamination of our FM translator policies. This new proceeding will consider the full range of issues pertaining to service authorization and technical rules and may result in further rules changes that would affect both commercial and noncommercial FM translators. *See Notice of Inquiry* in MM Docket No. 88-140, FCC 88-120, adopted March 24, 1988.

[5] *See Report and Order* in Docket No. 17159, 20 RR 2d 1538 (1970).

[6] *See* 47 CFR §74.1232(d).

[7] *See* 47 CFR §74.1231(b).

[8] *See Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1983); *First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985) and *Memorandum Opinion and Order* in Docket No. 20735, FCC 85-328, 50 FR 27954 (July 9, 1985).

[9] A list of parties who filed formal comments and reply comments is attached as Appendix A.

[10] These commenters are Evangel Christian School, Inc., Oregon Commission on Public Broadcasting, Southwestern Adventist College, Columbia Union College Broadcasting, Inc., and Moody Bible Institute of Chicaco. OCPB supports the proposed rule change regarding microwave transmission but takes no position with regard to satellite delivery.

[11] MST suggests standards comparable to those imposed on television translator applications. *See* 47 CFR §74.705.

[12] We note that we explicitly did not apply the FM-TV 6 interference standards adopted in the *Memorandum Opinion and Order* in Docket No. 20735, *supra* note 8, to FM translators. MST's suggestion is beyond the scope of the issues addressed in this proceeding and thus will not be discussed further herein.

[13] These are National Public Radio, Rocky Mountain Corporation for Public Broadcasting, and Rocky Mountain Public Radio, Inc.

[14] These are Communicom-Corporationof America, Furniture City Broadcasting Corporation, et al., Olympic Broadcasters, Inc., Salem Broadcasting Services, Satellite Radio Network, Universal Broadcasting Corporation and WDAC Radio Company. The Intercollegiate Broadcsting Network, KBLE-AM and KRXU, Inc. also filed opposing comments.

[15] *See supra* note 8.

[16] Section 74.1231(c) of the rules currently provides that translators may not be used solely for the purpose of relaying a signal to another translator. *See* 47 CFR §76.1231(c).

[17] *See* Notice, *supra* at para. 10.

[18] *See* Notice of Inquiry in MM Docket No. 88-120, *supra* note 4.

[19] Use of other private and common carrier microwave and satellite facilities is not restricted to specific types of services and therefore rule changes are not necessary to allow noncomercial translators to be fed via stations in those services.

[20] *See* Report and Order in MM Docket No. 87-13, 2 FCC Rcd 4625 (1987).

[21] *See supra* note 2.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-112**

In the Matter of

Amendment of Part 74 of the
Commission's Rules to Provide for
Satellite and Terrestrial Microwave
Feeds to Noncommercial Educational
FM Translators

## FURTHER NOTICE OF PROPOSED RULE MAKING

**Adopted: March 24, 1988; Released: April 15, 1988**

By the Commission:

### INTRODUCTION

1. By this *Further Notice of Proposed Rule Making (Notice)*, the Commission is proposing to amend its rules to permit all noncommercial educational FM translators assigned to reserved frequencies (channels 200-220) to rebroadcast signals that are relayed by any technical means.[1] Under the current rules, such translators are limited to the rebroadcast of signals received directly off-the-air from their primary station or another translator.[2] In the *Report and Order* in this proceeding, which we are adopting today in a separate action, we are modifying this rule to provide authority for noncommercial educational translators assigned to reserved channels and owned and operated by their primary stations to use alternative signal delivery methods, including but not limited to satellite and microwave facilities.[3] The rule change proposed herein would extend this authority to noncommercial translators that are owned and/or operated by parties other than their primary station.

### BACKGROUND

2. The FM translator service was instituted in 1970 as a means to supplement primary service provided by full service FM stations. FM translators retransmit the signals of a full service station on another frequency at low output power. As provided in Section 74.1231 of the Commission's rules, FM translators are authorized to extend radio service to areas which are unable to receive satisfactory service by reason of distance or terrain obstructions.[4] To ensure that translators are used only for these specific purposes, and not to extend competitively the service area of full service FM station, the Commission imposed restrictions on ownership of translators by licensees of full service commercial FM stations.[5] The Commission found there to be less potential for competitive harm to full service noncommercial FM stations by noncommercial translators and therefore did not impose ownership restrictions on noncommercial translators. As part of these rules, the Commission also restricted both commercial and noncommercial stations to rebroadcasts of signals received directly over-the-air. However, it did not articulate its reasoning for extending this provision to noncommercial translators.

3. On October 31, 1985, the Moody Bible Institute of Chicago (Moody) filed a Petition for Rule Making requesting that the Commission amend its rules to allow licensee owned and operated noncommercial FM translators operating on reserved channels to receive signals fed by satellite or terrestrial microwave facilities. In response to this petition, the Commission issued the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, therein proposing to amend its rules specifically as requested by Moody.[6]

4. In the *Report and Order*, we found that expanding the allowable means of signal delivery for noncommercial translators would benefit the public by increasing service to unserved and underserved areas and would improve the quality of existing service, but would not change the secondary nature of the translator service. We also observed that it appeared to be desirable to permit all noncommercial FM translators assigned to reserved channels to use alternative means of signal delivery. However, because a more general relaxation of the signal delivery restriction was not contemplated in the *Notice*, we did not have an appropriate record upon which to base such an action.

### DISCUSSION

5. We believe that it is desirable to extend the authorization for use of alternate means of signal delivery to non-licensee owned or operated noncommercial FM translator facilities. This rule change would offer the same benefits as our action in the *Report and Order*. That is, it would facilitate the provision of noncommercial radio service to unserved and underserved areas and the improvement of service by existing noncommercial translators. As we recognized in the *Report*, the existing restrictions on the permissible means of signal delivery limit both the area which can be served by noncommercial FM stations and, in many areas, the quality of the signal that can be received by the public. Maintaining a restriction on signal delivery to non-licensee owned and/or operated translator stations likewise limits the areas which may be served by noncommercial FM stations and the quality of service that can be provided by many translators.

6. We also believe that extension of the authority to use alternative signal delivery means to all noncommercial translators may be more effective in promoting service to remote areas than the more limited change adopted in the *Report and Order*. Local organizations in remote communities may be more attuned to the need for noncommercial service in their area and more willing to pursue the construction and operation of a translator than the licensee of a full service station that is located in a distant community. In our review of the record compiled as a result of the *Notice* in this proceeding, it has become apparent that continuing to restrict the means of signal delivery for non-licensee owned translators could, effectively, keep noncommercial radio service from many areas where it is most needed. Such a result is inconsistent with the purpose of the translator service and of the rule changes adopted in the *Report and Order*. We recognize, however, that there may be a concern that local noncommercial stations should be given the opportunity to

use translators to fill in their respective service areas, or even extend their service to adjacent areas, before permitting third party acquisition of the translator. Therefore, we solicit comment on whether the Commission should adopt procedures that would give local broadcasters priority in acquiring translators located within their 1 mv/m contour. Interested parties are asked to address whether such a policy should be implemented through a filing window priority period or some form of competitive preference.

7. This proposed extension of authority is not intended to alter the secondary nature of the translator service. As we indicated in the *Report and Order*, translators will continue to be authorized on a secondary, non-interference basis. In addition, we do not believe that the processing of new translator applications which may result from the proposed rule change will adversely affect the processing of applications for new full service stations.[7]

8. Accordingly, we propose to amend Section 74.1231 of our rules to provide that all noncommercial translators assigned to reserved channels may receive signals for rebroadcast via any technical means the translator licensee deems suitable including microwave and satellite facilities as set forth in the attached Appendix. We request comment on all aspects of this proposal.

9. In order to realize the full benefits of this proposal and the rule change adopted in the *Report and Order*, we intend to allow broadcast auxiliary intercity relay microwave facilities to be used to deliver signals to noncommercial translators.[8] In the *Notice* in this proceeding, we proposed to authorize intercity relay stations that serve noncommercial translators on a parity basis with broadcast auxiliary stations that serve full service stations. However, we recognize that the broadcast auxiliary frequencies are congested now in many areas, especially in the larger markets, and that the rule changes we are making in this proceeding likely will increase the demand for these frequencies. We therefore question whether it would be desirable to treat broadcast auxiliary stations that carry programming to noncommercial translators the same as such stations that carry programming to full service stations. We solicit comment on whether authorization of broadcast auxiliary channels for use in conjunction with a translator station should be made on a secondary basis to minimize the impact on the availability of broadcast auxiliary facilities for use in delivery of signals to full service stations, or whether, with respect to these channels, translators should enjoy the same status as broadcast stations. A secondary authorization would provide that broadcast auxiliary channels could be used to deliver signals to noncommercial translators where such use would not interfere with use of those channels to serve full service stations.[9] This secondary authority would be similar to that which we recently provided for use of broadcast auxiliary facilities in conjunction with FM booster stations in MM Docket No. 87-13.[10] As a starting point for discussion, we have set forth proposed amendments to Sections 74.501, 74.531 and 74.532 of our rules that would authorize broadcast auxiliary station use with noncommercial translators on a secondary basis in the Appendix.

## PROCEDURAL MATTERS

*Regulatory Flexibility Act - Initial Analysis*

10. *Reason for Action*. Permitting noncommercial educational FM translators to receive signals distributed by any technical means is expected to increase radio service to areas that are currently underserved.

11. *Objective*. The Commission is proposing to modify the types of signals which noncommercial educational FM translators may receive for rebroadcast in order to increase the diversity of radio programming available to many segments of the population.

12. *Legal Basis*. The proposed amendment is authorized under Section 303 of the Communications Act of 1934, as amended.

13. *Description, Potential Impact and Number of Small Entities Affected*. Permitting all noncommercial educational FM translators to use alternative means of signal delivery other than direct over-the-air reception of broadcast signals is expected to benefit radio listeners, licensees of noncommercial stations and translators not owned and/or operated by their primary station. Signals delivered by facilities such as microwave links, leased-access lines, and satellite stations are often more dependable than direct transmissions and can reach more distant locations with a high quality signal. The public would benefit from the introduction of new service in areas that now lack adequate radio service. We do not know the number of local organizations that will avail themselves of the opportunity to use these additional technologies to bring programming to their noncommercial translators. However, any effects of this rule change would be expected to be only positive in nature, as we do not contemplate requiring the use of alternate signal delivery methods that would be authorized under this proposal.

14. *Federal Rules which Overlap, Duplicate or Conflict with this Rule*. None.

15. *Significant Alternatives*. The alternative is to maintain the current rule. The Commission believes that to do so will hinder the extension of noncommercial radio service to underserved areas. Further, the affected noncommercial educational FM licensees will be deprived of the opportunity to use a less expensive and superior technology.

16. *Any significant alternative minimizing the impact on small entities and consistent with the stated objective* : None.

17. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and except for the additional applications expected to be received, will not increase or decrease burden hours imposed on the public.

18. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public

notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or abduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

19. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

20. Pursuant to applicable procedures set forth in §§1.415, 1.419 and 1.49 of the Commission's rules, interested parties may file comments on or before **June 6, 1988,** and reply comments on or before **June 21, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may consider information not contained in the comments provided that such information or a written indication of the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

21. To participate formally in this proceeding, participants must file an original and 5 copies of all comments, reply comments and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and 11 copies must be filed. To participate informally in this proceeding, participants may submit one copy of their comments. Docket Number 83-670 should be specified in the heading. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

22. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IFRA) of the expected impact of these proposed policies and rules on small entities. The IFRA is set forth above. Written comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice of Proposed Rule Making / Notice of Inquiry*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

23. The Secretary shall cause a copy of this *Further Notice of Proposed Rule Making / Notice of Inquiry* including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 *et seq.*).

24. The proposed rule change contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours imposed on the public.

25. Authority for this proceeding is contained in Sections 4(i) and 303 of the Communications Act of 1934 as amended.

26. For further information regarding this proceeding, contact Tatsu Kondo, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## APPENDIX

**Part 74 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:**

1. The authority citation for Part 74 would continue to read as follows:

**Authority: 47 U.S.C. 154 and 303.**

2. 47 CFR 74.501 is proposed to be amended by revising paragraph (b) to read as follows:

**§74.501 Classes of aural broadcast auxiliary stations.**

* * * * *

(b) *Aural broadcast intercity relay station.* A fixed station for the transmission of aural program material between radio broadcast stations, other than international broadcast stations, between FM radio broadcast stations and their co-owned FM booster stations, between noncommercial educational FM radio stations and noncommercial educational FM translator stations assigned to reserved channels (Channels 200 to 220), or other purposes as authorized in §74.531.

* * * * *

3. 47 CFR 74.531 is proposed to be amended by redesignating paragraphs (c) through (g) as (d) through (h) and adding new paragraph (c) to read as follows:

**§74.531 Permissible service.**

* * * * *

(c) An aural broadcast intercity relay station is authorized to transmit aural program material between a noncommercial educational FM station and a noncommercial educational FM translator station assigned to a noncommercial educational reserved channel (Channels 200 to 220). This use shall not interfere with or otherwise preclude use of these broadcast auxiliary stations transmitting aural programming between the studio and transmitter location of a broadcast station or between broadcast stations as provided in paragraphs (a) and (b) above.

* * * * *

4. 47 CFR 74.532 is proposed to be amended by revising paragraph (a) to read as follows:

**§74.532 Licensing requirements.**

(a) An aural broadcast STL or intercity relay station will be licensed only to the licensee or licensees of broadcast stations other than international broadcast stations, and for use with broadcast stations, noncommercial educational FM translator stations assigned to reserved channels or FM booster stations owned entirely by or under common control of the licensee of the primary station.

* * * * *

5. 47 CFR 74.1231 is proposed to be amended by revising paragraph (b) to read as follows:

**§74.1231 Purpose and permissible service.**

* * * * *

(b) Except as set forth in paragraphs (f) and (g) of this section, an FM translator may be used only for the purpose of retransmitting the signals of a primary FM broadcast station or another translator station which have been received directly through space, converted, and suitably amplified. However, a noncommercial educational FM translator station operating on a reserved channel (channels 200 to 220) may use alternative signal delivery means, including, but not limited to, satellite and microwave facilities.

* * * * *

**FOOTNOTES**

[1] This action does not address the use of alternative signal delivery technology by noncommercial translators operating in the non-reserved band. In view of the fact that commercial and noncommercial FM translators compete for the same channel space in the non-reserved portion of the FM band, we do not believe it is desirable to consider the use of alternate signal delivery technology by noncommercial translators operating on non-reserved channels separate from that of commercial translators. Accordingly, we are addressing the issue of use of alternate signal delivery technology by both commercial and noncommercial FM translators operating on non-reserved channels in the separate proceeding we are initiating today to undertake a comprehensive reevaluation of the role of FM translators in the radio broadcasting service. *See Notice of Inquiry* in MM Docket No. 88-140, FCC 88-120, adopted March 24, 1988.

[2] *See* 47 CFR §74.1231(b).

[3] *See Report and Order* in MM Docket No. 86-112, FCC 88-125, adopted March 24, 1988.

[4] *See* 47 CFR §74.1231.

[5] *See* 47 CFR §74.1232.

[6] *See Notice of Proposed Rule Making* in MM Docket No. 86-112, adopted April 3, 1986, 51 FR 15026.

[7] We also note that in conjunction with our comprehensive reevaluation of the role of FM translators in the radio broadcast service, we are imposing a general "freeze" on the acceptance of applications for new FM translator stations pending final action in that proceeding. *See Notice of Inquiry* in MM Docket No. 88-140, *supra* at n. 1. However, we are providing an exception to the general freeze on translator applications to permit the filing of new noncommercial, educational FM translators seeking assignment to channels on the reserved frequency band (channels 200-220). This will permit the implementationof the noncommercial signal delivery technology rule changes adopted in the *Report* and Order. We also are providing an exception to the freeze to permit the filing of applications for stations that would be mutually exclusive with an application that is exempt from the freeze.

[8] In this regard, private and common carrier microwave and satellite facilities are permitted to provide this type of service and, therefore, rule changes are not necessary to allow noncommercial translators to use those facilities for delivery of program signals.

[9] Until this question is resolved, we will accept applications for aural broadcast auxiliary stations to be used to transmit the signal of a primary station to its noncommercial educational translators subject to the condition that such use be on a secondary basis with respect to use of such channels in conjunction with full service stations. *See* Report and Order in MM Docket No. 86-112, *supra*, note 2.

[10] *See* Report and Order in MM Docket No. 87-13, 2 FCC Rcd 4625 (August 16, 1987).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-152**

In the Matter of
Amendment of Section 73.202(b), RM-6291
Table of Allotments,
FM Broadcast Stations.
(Denison, Texas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 24, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Sunbelt Wireless Company (petitioner), licensee of Station KMKT-FM, Channel 285A, Denison, Texas, filed a petition for rule making seeking the substitution of Channel 285C2 for Channel 285A and modification of its license to specify operation on the higher class co-channel. A first wide coverage area FM station could be provided. Petitioner submitted information in support of its proposal.

2. The substitution can be made consistent with the Commission's minimum separation requirements with a site restriction of 21.0 kilometers (13.0 miles) east of the city.[1] The restricted site is necessary in order to avoid short spacings to Station KWNS(FM), Channel 285A, Winnsboro, Texas and Station KZBX(FM), Channel 285A, McAlester, Oklahoma.

3. We believe the proposal warrants consideration. As requested, we shall propose to modify the license of Station KMKT-FM to specify operation on the higher class co-channel, Channel 285C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Denison.

4. The Commission believes it is in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Denison, Texas | 285A | 285C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Herbert D. Miller, Jr., Esquire
Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided or a settlement or agreement by the parties has been approved by the Commission and such decision or approval is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for the proposed site are North Latitude 33-45-22 and West Longitude 96-46-22.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-326**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.606(b), | RM-5323 |
| Table of Allotments, | RM-5588 |
| Television Broadcast Stations. | RM-5592 |
| (Albany, Buffalo, Ilion, and Utica, New York, and Boston, Massachusetts) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 14, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Orders to Show Cause*, 2 FCC Rcd 4300 (1987), proposing to change the offset designations of Stations WIVB-TV, Channel 4-, Buffalo, New York, and WBZ-TV, Channel 4-, Boston, Massachusetts, from minus to zero and plus, respectively, so that Channel 4 could be allocated to Utica, New York, as the community's fourth local commercial television service, at the request of Mohawk Valley Telecasters, Inc. (petitioner). Messrs. Frederick B. Bowen and Sherril W. Taylor (Bowen and Taylor) filed comments supporting the allocation of Channel 4 to Utica. Mohawk Valley Broadcasting, Inc. (MVB) filed comments supporting the allocation of Channel 67 to Ilion, New York. No other comments were received.

## BACKGROUND

2. By *Notice of Proposed Rule Making and Orders to Show Cause*, 51 Fed. Reg. 29130, published August 14, 1986, the Commission proposed the allocation of VHF TV Channel 4 to Utica, New York, as the community's fourth local commercial television service, and related offset changes for Stations WIVB-TV, Buffalo, New York, and WBZ-TV, Boston, Massachusetts. In response, Buffalo Broadcasting (WIBV-TV), licensee of WIVB-TV, filed an opposition to the change in its offset designation and requested a hearing pursuant to Section 316(a) of the Communications Act of 1934, as amended. Post-Newsweek Broadcasting Company, Inc. (WDIV), licensee of Station WDIV(TV), Channel 4, Detroit, Michigan, also opposed the allotment at Utica. In the instant *Order to Show Cause*, the Commission reached a preliminary decision that the issues raised in the oppositions of WIVB-TV and WDIV did not warrant denying the allocation of Channel 4 to Utica. As to WIBV-TV's request for a hearing, we noted that the Commission had recently amended Section 1.87 of the Rules to provide that a station affected by a proposed change in the Table of Allotments was no longer afforded an automatic right to a hearing on request. *See Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987). However, in order that no prejudice would accrue to parties in those proceedings where an *Order to Show Cause* had already been issued, such as here, interested parties, particularly WIBV-TV and WBZ-TV, were afforded an opportunity to more fully put forth any data and arguments concerning the effect of a Channel 4 allotment at Utica on their co-channel operations.

3. The *Order to Show Cause* also denied the counterproposals of Mohawk-Hudson Council on Educational Television to allocate Chanel 4 to Albany, New York, and to reserve it for noncommercial educational use and by MVB which sought the allocation of Channel 4 to Ilion, New York, as the community's first local television service. While no alternate channel was proposed for use at Albany, the *Order to Show Cause* stated that UHF-TV Channel 67 could be allocated to Ilion.

## DISCUSSION

4. Neither WIBV-TV, Buffalo, New York, or WBZ-TV, Boston, Massachusetts, filed comments in response to paras 19 and 20 of the *Order to Show Cause* under consideration herein, and are thus deemed to have consented to the modification of their licenses. Petitioner also failed to file comments supporting the allotment of Channel 4 to Utica. However, as noted above, Bowen and Taylor did file comments supporting the allotment and stating an intention to apply for the channel, if allocated. In addition, MVB filed comments stating its intention to apply for Channel 67 if allocated to Ilion.

5. Based on the record before us, we believe the public interest would be served by allocating Channel 4- to Utica, New York, as an interest has been expressed in providing the community with an additional television service and by allocating Channel 67- to Ilion, New York, as the community's first local television service. Channel 4- can be allocated to Utica in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.4 miles east to avoid a short-spacing to Station WSTM-TV, Channel 3, Syracuse, New York.[1] In addition, the offset designation for co-channel Station WIVB-TV, Buffalo, New York, will be changed from minus to zero, and the offset designation for co-channel Station WBZ-TV, Boston, Massachusetts, will be changed from minus to plus. Commission policy requires that the ultimate permittee of Channel 4 at Utica reimburse both the Buffalo and Boston stations for the reasonable costs associated with the change in their offsets. Bowen and Taylor have stated their willingness to do so. Channel 67- can be allocated to Ilion, New York, in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 miles southeast to avoid a short-spacing to unoccupied and unapplied for Channel *59 at Utica, New York.[2] Neither Ilion nor Utica are affected by the recently imposed freeze on new allotments or applications for new allotments within the minimum co-channel separation distance of thirty major markets. *See Order*, 52 FR 28346, July 29, 1987.

6. Canadian concurrence in these allotments has been received since both communities are located within 250 miles of the U.S.-Canadian border.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS

ORDERED, That effective **June 2, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Boston, Massachusetts | *2+, 4+, 5-, 7+, 14, 16, 25+, 38, *44+, 56, 68+ |
| Buffalo, New York | 2, 4, 7+, *17, *23, 29-, 49-, 59- |
| Ilion, New York | 67- |
| Utica, New York | 2-, 4-, 20+, 33, *59 |

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Group W. Television, Inc., Station WBZ-TV, Channel 4-, Boston, Massachusetts, and Buffalo Broadcasting Co., Inc., Station WIVB-TV, Channel 4-, Buffalo, New York, ARE MODIFIED effective **June 2, 1988,** to specify operation on Channels 4+ and 4, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the licenses of Station WBZ-TV, Boston, Massachusetts (BLCT-2095) and WIVB-TV, Buffalo, New York (BLCT-2393), except for those as specified above. Any other changes, except for those as specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 340).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Licenses BLCT-2095 and BLCT-2393, respectively, except for the channel offset as specified above and a license application (FCC Form 341) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the following licensees:

Group W. Television, Inc.
Station WBZ-TV
888 Seventh Avenue
New York, New York 10106

Buffalo Broadcasting Co., Inc.
Station WIVB-TV
2077 Elmwood Avenue
Buffalo, New York 14207

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The coordinates for Channel 4- at Utica are: North Latitude $43^0$, 07', 50"; West Longitude $74^0$, 57', 44".

[2] The coordinates for Channel 67- at Ilion are: North Latitude $42^0$, 56', 43"; West Longitude $74^0$, 53', 40".

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-149**

In the Matter of

Amendment of Section 73.202(b), RM-6128
Table of Allotments,
FM Broadcast Stations.
(Wabasha, Minnesota)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 16, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Interstate Communications, Inc. (petitioner),[1] requesting the allocation of FM Channel 273A to Wabasha, Minnesota, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 273A can be allocated to Wabasha, Minnesota, in compliance with the minimum distance separation requirements provided there is a site restriction 4.6 kilometers (2.9 miles) west of the community.[2] The site restriction will prevent a conflict with Station WHTL-FM, Channel 272A, Whitehall, Wisconsin.

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to Wabasha, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Wabasha, Minnesota | --- | 273A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark E. Fields
Miller & Fields,
P.O. Box 33003
Washington, D.C. 20033
(Counsel for the petitioner)

Interstate Communications, Inc.
P.C. Box 46
Wabasha, Minnesota 55981

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7.For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] Interstate Communications, Inc. is the licensee of AM Station KWMB, Wabasha, Minnesota, operating daytime only.

[2] The restricted site coordinates are 44-23-06, 92-05-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN. Docket No. 87-14**

In the Matter of

| | |
|---|---|
| Amendment of Part 2 | RM-4829 |
| of the Commission's Rules | RM-4831 |
| Regarding the Allocation | RM-4983 |
| of the 216-225 MHz Band | |

## ORDER DENYING EXTENSION OF TIME FOR REPLY COMMENTS

**Adopted: March 30, 1988** **Released: April 8, 1988**

By the Office of Engineering and Technology:

1. The Commission has received a Motion for Extension of Time for Reply Comments (Motion) from Mr. Arthur Reis on Comments filed by United Parcel Service of America, Inc. (UPS). Mr. Reis argues that additional time is needed so that the amateur media may be alerted to the UPS comments. Further, Mr. Reis states that he is aware of new technology which he argues may solve the problems of ACSB operations in the existing land mobile bands.

2. The reply period (15 days) should have provided ample time to reply to the single comment filed by UPS. The time chosen was announced in a FCC news release and also in the Federal Register. We have received no argument persuading us that additional time is warranted. The petitioner's argument that additional time is needed to describe new land mobile developments is vague and in any event, not responsive to the UPS comments. We point out that Section 1.46 (a) of the FCC Rules, 47 CFR 1.46(a), states that extensions of time shall not be routinely granted. In light of these considerations, the subject Motion IS DENIED.

3. This action is taken pursuant to authority found in Sections 4(i), 302, and 303 of the Communications Act of 1934 as amended, 47 U.S.C. Sections 154(i),302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-155**

In the Matter of

Amendment of Section 73.202(b), RM-6149
Table of Allotments,
FM Broadcast Stations.
(Pentwater, Michigan)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 18, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by James J. McCluskey (petitioner), requesting the allotment of FM Channel 222A[1] to Pentwater, Michigan, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. Petitioner is one of two applicants for FM Channel 276A at Pentwater, and argues that when multiple applications are received, one way to resolve the conflict is through allocation of an additional channel. According to petitioner, since there are only two applicants, it appears that proposing another channel for the community is a likely choice for resolving the conflict.

3. We believe petitioner's proposal warrants consideration. As indicated in footnote 1, *supra*, Channel 231A can be allocated to Pentwater, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules.[2] Since this allocation is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government will be required.

4. In view of the fact that the proposed allocation could provide a second FM broadcast service to Pentwater, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Pentwater, Michigan | 276A | 231A, 276A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James J. McCluskey
220-1/2 South Michigan
Big Rapids, Michigan 49307

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certificationthat Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The allocation of FM Channel 222A to Pentwater, Michigan would be short spaced to Channel 225C, Station WKJF-FM, Cadillac, Michigan. To avoid this conflict, we have substituted FM Channel 231A at Pentwater for consideration herein.

[2] The channel can be allotted at the coordinates 43-46-30 and 86-26-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-156**

In the Matter of

Amendment of Section 73.202(b), RM-6018
Table of Allotments,
FM Broadcast Stations.
(Mora and Nisswa, Minnesota)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 18, 1988** **Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by John Godfrey (petitioner), seeking the allotment of FM Channel 227C1 to Mora, Minnesota, as that community's second FM broadcast service. Petitioner also requests the deletion of FM Channel 227C at Nisswa, Minnesota. Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel.

2. Channel 227C1 can be allocated to Mora, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 227C is deleted from Nisswa, Minnesota.[1] Channel 227C was allocated to Nisswa in MM Docket 83-465 (51 FR 21912, June 17, 1986). The window period for filing applications for Channel 227C at Nisswa opened on July 17, 1986 and closed on August 15, 1986, and currently there are no applications on file at the Commission for the channel. A staff study determined there are no other Class C channels available as a substitute at Nisswa and no other Class C1 channels available for Mora. Furthermore, we have determined that downgrading the Class of the Nisswa channel would not eliminate the short spacing to the Mora proposal.

3. The allotment of Channel 227C1 at Mora also requires a site restriction 12.8 kilometers (8.0 miles) north of the community. The site restriction will prevent a conflict with an application filed by WAYL-FM, Channel 229C, Minneapolis, Minnesota (BPH 850712JU). Since Mora is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, Canadian concurrence must be obtained.

4. In view of the fact that the proposed allotment could provide a second broadcast service and a first wide coverage area station to Mora, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Mora, Minnesota | $237A_2$ | 237A, 227C1 |
| Nisswa, Minnesota | 227C | — |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Godfrey
1100 Sixth St., N.E.
Minneapolis, Minnesota 55413

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, an oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The coordinates for Channel 227C1 at Mora are 45-59-50 and 93-17-54.

[2] Channel 237A was allocated to Mora, Minnesota in MM Docket 84-231, *First Report and Order,* 49 FR 3514, January 25, 1985. The window period opened on November 25, 1987 and closed on January 7, 1988.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-157**

In the Matter of

Amendment of Section 73.202(b), RM-6150
Table of Allotments,
FM Broadcast Stations.
(Arcadia, Michigan)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 18, 1988** **Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Kenneth J. Burch (petitioner), seeking the allocation of FM Channel 297A[1] to Arcadia, Michigan, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. Channel 300A can be allocated to Arcadia, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules.[2] Concurrence of the Canadian government will be requested since Arcadia, Michigan is located within 320 kilometers (200 miles) of the common U.S.-Canadian border.

3. In view of the fact that the proposed allocation could provide a first local FM service to Arcadia, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Arcadia, Michigan | — | 300A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kenneth J. Burch
P.O. Box 92037
Warren, Michigan 48092-0037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The allocation of Channel 297A to Arcadia, Michigan, would be short spaced to a rule making to substitute Channel 298A for Channel 221A at Traverse City, Michigan (RM-6001). To avoid this conflict, we have substituted FM Channel 300A at Arcadia for consideration herein.

[2] The coordinates for this proposal are 44-29-36 and 86-14-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-158**

In the Matter of

Amendment of Section 73.202(b), RM-6203
Table of Allotments,
FM Broadcast Stations.
(Lenoir, North Carolina)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 23, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Foothills Broadcasting of Lenoir (petitioner) requesting the allocation of Channel 277A to Lenoir, North Carolina, as the community's first local FM service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 277A can be allocated to Lenoir in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) northwest to avoid a short-spacing to Station WSOC-FM, Channel 279C, Charlotte, North Carolina, and to the construction permit of Station WRLX, Channel 275C1, Hickory, North Carolina (BMPH-870121IB).[1] Use of this site restriction does not negate the short- spacing to the licensed site of Station WRLX at Hickory. Therefore, finalization of this allotment is contingent upon the licensing of Station WRLX at the transmitter site specified in its outstanding construction permit.

3. We believe the public interest would be served by proposing the allocation of Channel 277A to Lenoir, North Carolina, as the community's first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Lenoir, North Carolina | -- | 277A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr., Esq.
Ward & Mendelsohn, P.C.
1100-17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are: North Latitude 35-58-38; West Longitude 81-33-57.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-159**

In the Matter of

Amendment of Section 73.202(b), RM-6204
Table of Allotments,
FM Broadcast Stations.
(New London, New Hampshire)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 23, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Kevin O'Kane (petitioner) requesting the allocation of Channel 259A to New London, New Hampshire, as the community's first local FM service. Petitioner states that he will apply for the channel, if allocated.

2. Channel 259A can be allocated to New London in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Concurrence by the Canadian Government is required since New London is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allocation of Channel 259A to New London, New Hampshire, as the community's first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| New London, New Hampshire | -- | 259A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kevin O'Kane
RR 2, Box 73
Munnsville, New York 13409
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are: North Latitude 43-24-50; West Longitude 71-59-08.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-160**

In the Matter of

Amendment of Section 73.202(b), RM-6202
Table of Allotments,
FM Broadcast Stations.
(Bayard, Nebraska)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 23, 1988; Released: April 18, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Charles Ellis (petitioner) requesting the allocation of Channel 280C to Bayard, Nebraska, as the community's first local FM service. Petitioner states that he will apply for the channel, if allocated. Channel 280C can be allocated to Bayard in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[12]

2. We believe the public interest would be served by proposing the allocation of Channel 280C to Bayard since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Bayard, Nebraska | – | 280C |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **June 9, 1988,** and reply comments on or before **June 24, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. IT IS ORDERED, That the Secretary shall send a copy of this *Notice of Proposed Rule Making*, by CERTIFIED MAIL, RETURNED RECEIPT REQUESTED, to the licensee of Station KCMI, as follows: Christian Media Incorporated, 3305 North 10th, Terrytown, Nebraska 69361.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The coordinates for this allotment are: North Latitude 41-45-24; West Longitude 103-19-30.

[2] This allotment is short-spaced to the current operation of Station KCMI, Channel 280A, at Terrytown, Nebraska. However, by R eport and Ord er in MM Docket 83-1139, 49 FR 34226, August 29, 1984, KCMI was modified to Channel 245 and a construction permit specifying Channel 245C1 has been issued (BPH-861031MZ).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-477**

In the Matter of

Amendment of Section 73.202(b), RM-5540
Table of Allotments,
FM Broadcast Stations.
(Marathon, Florida)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 30, 1988; Released: April 19, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 1 FCC Rcd. 1340, released December 31, 1986, proposing the substitution of Channel 234C2 for Channel 232A at Marathon, Florida. The petitioner, Breeze 94, Inc., also requested that its license for Station WMUM(FM) at Marathon, be modified to specify operation on the Class C2 channel. Supporting comments were filed by the petitioner, restating its interest in Channel 234C2. Comments in opposition to the proposal were filed by Guy Gannett Publishing Company, licensee of Station WZTA-FM, Miami Beach, Florida, to which petitioner responded.

2. In its comments, Guy Gannett urges the Commission to terminate the Marathon proceeding in order to preserve its rights to upgrade to a full Class C facility. Reference is made to the August 5, 1985, *Applications for Review* of a Commission staff action which downgraded WZTA to a Class C1 facility, and to a July 9, 1987, reversal of that decision which allows WZTA(FM) to maintain full Class C status by filing a minor change application (*See* Reclassification of FM Facilities Pursuant to BC Docket 80-90, FCC 87-93, released March 24, 1987). Guy Gannett argues that while the proposal for Channel 234C2 at Marathon meets the spacing requirements to its application site for a Class C1 facility, it is short spaced by 10.25 kilometers for a full Class C station at the same site.

3. In responsive comments the petitioner offered an alternate proposal which would allow each station to upgrade its facility. Petitioner suggests substituting Channel 232C2 for Channel 232A at Marathon, in lieu of Channel 234C2 (as proposed by the *Notice)*, and modifying its Class A license to specify Channel 232C2.

4. We believe that the public interest would be served by substituting alternate Channel 232C2 for Channel 232A at Marathon, as requested by the petitioner, in order to provide that community with its first wide coverage area FM station. As requested, we shall also modify the Class A license for Station WMUM(FM), at Marathon to specify the Class C2 channel. The allotment can be made in compliance with the minimum distance separation requirements.[1]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

| City | Channel No. |
|---|---|
| Marathon, Florida | 232C2, 249A, 292A |

6. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMUM(FM), Marathon, Florida, IS MODIFIED, to specify operation on Channel 232C2, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for Channel 232C2 at Marathon are 24-42-48 and 81-05-06.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-148**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6033 |
| Table of Allotments, | RM-6101 |
| FM Broadcast Stations. | |
| (Ariton, Alabama and Bonifay, Florida) | |

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 4, 1988; Released: April 19, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein two separately-filed petitions for rule making. The first, filed on behalf of Patsy Nance Marsh and Rickey Earl Nance (Marsh and Nance), seeks the allotment of Channel 249A to Ariton, Alabama, as its first local service (RM-6033). The second proposal, filed on behalf of Mary Lake Communications, Inc. (Mary Lake), licensee of Station WTBB(FM) (Channel 249A), Bonifay,[1] Florida, seeks the substitution of Channel 249C1 for Channel 249A and modification of its license accordingly (RM-6101).

2. Although petitioner describes Ariton as a "growing community in the Alabama wiregrass' farm area," that is devoid of any local broadcast service, we cannot determine, on the basis of the information supplied, that it is a *bona fide* community for allotment purposes. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly and equitably allocate frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Ariton is not listed in the U.S. Census.[2] Thus, the petitioner should present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See , e. g., Ansley, AL*, 46 FR 58688 (1981); *Cascade Village, CO*, 48 FR 19917 (1983); *Ellwood, CA*, 50 FR 13031 (1985).

3. An analysis of the above proposals reveals that one is seeking a first local service (RM-6033), while the second seeks a modification of an existing Class A license (RM-6101). A staff engineering analysis has determined that Channel 249A can be allotted to Ariton in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefore is sited in an area at least 12 kilometers (7.5 miles) north [3] of the community to negate a short spacing to Station WKKR(FM) (Channel 249A), Auburn, Alabama, as well as a rule making proposal to allot Channel 250A to Eufaula, Alabama (RM-6034). Conversely, Channel 249C1 can be substituted for Channel 249A at Bonifay, Florida, utilizing the petitioner's preferred transmitter site 11.9 kilometers (7.4 miles) southwest[4] of the community. The distance between the two proposals is 112.1 kilometers whereas 196 kilometers is required between Class A-C1 co-channels. Thus, since the proposals are separated by less than the minimum distance required by Section 73.207(b) of the Commission's Rules, and we are unaware, at this time, of any other channels to accommodate each proposal, it appears that only one can be granted.

4. As a result of our preliminary analysis, the proposals herein must be considered on a comparative basis. Accordingly, we shall provide each proponent an opportunity to demonstrate in comments why their community should be preferred. In this regard, the parties should be guided by the allotment priorities enunciated in the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first aural service

(2) second aural service

(3) first local service

(4) other public interest matters

Co-equal weight is given to priorities (2) and (3).

5. Our preliminary approach to this proceeding would favor a first local service at Ariton, Alabama (priority 3), in the absence of a showing by the Bonifay modification proposal (priority 4), specifying the provision of a first or second aural service.

6. In view of the above, we believe the public interest would be served by soliciting comments on the alternate proposals to provide a first local service at Ariton or a first expanded coverage FM service at Bonifay.

7. Since the Bonifay modification proposal seeks to upgrade on its present channel, we shall propose to modify the license of Station WTBB(FM) (Channel 249A), as requested, in the event Channel 249C1 is substituted for Channel 249A. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, no other expressions of interest in the Bonifay proposal will be accepted.

8. Accordingly, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Ariton, Alabama | -- | 249A |
| or | | |
| Bonifay, Florida | 249A | 249C1 |

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particu-

lar, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **June 10, 1988,** and reply comments on or before **June 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Paul Reynolds
AmeriMedia
415 N. College St.
Greenville, AL 36037
(Consultant to
Patsy Nance Marsh
and Rickey Earl Nance)
(RM-6033)

C. F. Ellis
1103 La Nouvelle Rd.
Lafayette, LA 70508
(Consultant to Mary Lake
Communications,Inc.)
(RM-6101)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Channel 249A, formerly allocated to Chipley, Florida, but used at Bonifay by Station WTBB(FM), was reallocated to the latter community to reflect its city of license (see, Public Notice, 52 FR 39774, October 23, 1987).

[2] We do note, however, that Ariton is listed in the 1987 edition of the Rand-McNally Road Atlas, to which it attributes a population of 844 persons. Nevertheless, mere geographical location is not sufficient to establish "community"status. *See* , Vimville, MS, 48 FR 5974 (1983).

[3] Reference coordinates of the restricted site are: 31-42-14; 85-45-14.

[4] Reference coordinates utilized by Mary Lake are: 30-41-57; 85-37-15.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-153**

In the Matter of

Amendment of Section 73.202(b), RM-6273
Table of Allotments,
FM Broadcast Stations.
(McFarland and Cartago, California)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 18, 1988; Released: April 19, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of Caballero Spanish Media, Inc. (petitioner), permittee of Station KXFM(FM) (Channel 275A), McFarland, California, seeking the substitution of Channel 275B1 for Channel 275A and modification of its permit accordingly. In order to accomplish its proposal in compliance with Section 73.207(b) of the Commission's Rules, petitioner advises that an additional change is required at Cartago, California. Specifically, petitioner seeks the substitution of Channel 273A for Channel 275A at Cartago.[1]

2. A staff engineering analysis reveals that Channel 275B1 can be substituted for Channel 275A at McFarland, California, at the petitioner's specified site, which is 20.8 kilometers (12.9 miles) south[2] of the community. Moreover, Channel 273A can be substituted for Channel 275A at Cartago, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. [3]

3. In light of the above, we shall propose to modify the petitioner's permit to specify operation on Channel 275B1 at McFarland, California, as requested. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest in the use of Channel 275B1 at McFarland.

4. Additionally, we shall serve a copy of this *Notice* on the applicant for Channel 275A at Cartago, California. In the event Channel 275B1 is ultimately allotted to McFarland prior to the issuance of a permit for Channel 275A at Cartago, the applicant may amend his application to specify the new channel. This may be accomplished without loss of "cut-off" status since no upgrade in class of channel will result. *See , Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985); and *Sanibel, FL*, 50 FR 32706 (1985).

5. Conversely, in the event a permit is issued for Channel 275A at Cartago prior to finalization of the instant proceeding, Commission policy requires that the petitioner herein reimburse the permittee for costs incurred in changing frequencies to Channel 273A. Petitioner has indicated its willingness to reimburse the ultimate permittee for reasonable costs associated therewith.

6. In light of the above, and in order to provide McFarland, California, with its first wide area coverage FM service, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the communities listed below, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Cartago, California | 275A | 273A |
| McFarland, California | 275A | 275B1 |

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 275A at Cartago, California, as follows:

Michael L. Benson
9872 Esquon
Durham, CA 95938

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **June 10, 1988,** and reply comments on or before **June 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's consultant, as follows:

Don Werlinger
The Broadcast Development Group, Inc.
P.O. Box 1223
Lockhart, TX 78644

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply

comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Channel 275A was allotted to Cartago in MM Docket No. 84-231. The filing window therefor closed on July 7, 1986, without evoking any interest. Consequently, the allotment may now be altered. *See* , Memorandum Opinion and Order, 51 FR 36401, October 10, 1986. Although an application was subsequently filed (File No. BPH-870331PX), the proposed substitution of Channel 273A for Channel 275A can be accommodated at the applicant's specified site, as discussed in footnote 3, *infra.*

[2] Reference coordinates of petitioner's intended site are North Latitude 35-29-33, West Longitude 119-11-43.

[3] Reference coordinates used for this determination are North Latitude 36-19-12, West Longitude 118-01-30. Additionally, proposed Channel 273A can be utilized at the specified site of the sole applicant for Channel 275A at Cartago, as follows: North Latitude 36-19-16, West Longitude 118-01-22.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-154**

In the Matter of

Amendment of Section 73.202(b), RM-6200
Table of Allotments,
FM Broadcast Stations.
(Grifton, North Carolina)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 18, 1988; Released: April 19, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by MC Radio Partnership (petitioner), requesting the substitution of Channel 258C2 for Channel 257A at Grifton, North Carolina, and the modification of its permit for a new FM station to specify the higher powered channel. Petitioner states that it will apply for the channel, if allocated. Channel 258C2 can be allocated to Grifton in compliance with the Commission's minimum distance separation requirements with a site restriction of 26.0 kilometers (16.2 miles) southeast to avoid a short-spacing to Station WMAG, Channel 258C, High Point, North Carolina, and to unused and unapplied for Channel 258A at Emporia, Virginia.[1]

2. As requested, we shall also propose to modify petitioner's permit to specify operation on Channel 258C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 258C2 at Grifton nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by other interested parties.

3. We believe the public interest would be served by proposing the allocation of Channel 258C2 to Grifton, North Carolina, since it could provide the community with expanded radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Grifton, North Carolina | 257A | 258C2 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 10, 1988,** and reply comments on or before **June 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David D. Oxenford, Esq.
Fisher, Wayland, Cooper & Leader
1255-23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 35-14-10; West Longitude 77-12-22.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-504**

In re Application of

Linda Turner d/b/a TURNER BROADCASTING AND COMMUNICATIONS File No. BPCT-860815KF

For Construction Permit
for a New Television Station
Victoria, Texas

**Appearances**

*Nelson Blitz* and *Linda Turner* (*Pro Se*) on behalf of Linda Turner d/b/a Turner Broadcasting and Communications; and *Linda Bocchi* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

**SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ**

**Issued: April 8, 1988; Released: April 19, 1988**

1. Under consideration is the Mass Media Bureau's Motion for Summary Decision filed on March 22, 1988.[1]

2. The Commission's Mass Media Bureau requests that the Presiding Judge issue an order granting summary decision adverse to Linda Turner d/b/a Turner Broadcasting and Communications (Turner) of the financial qualifications issue designated against Turner in the *Memorandum Opinion and Order*, FCC 87M-1392, released June 22, 1987; and that he further order that this proceeding be terminated.

3. As noted by the Bureau, the parties were ordered to exchange all exhibits in support of their entire direct case on March 15, 1988 (*see*, *Order*, FCC 87M-1629, released July 13, 1987). A careful review of Ms. Turner's direct case received by the Mail Branch of this Commission on March 15, 1988 discloses that she has failed to provide a written direct case on the financial issue which has been pending for more than a year. Ms. Turner was given both the burden of proceeding and the burden of proof on the financial qualifications issue. (*See* , *Memorandum Opinion and Order*, FCC 87M-1392, released June 22, 1987.)

4. The Presiding Judge concludes, therefore, that Ms. Turner's failure to address that issue warrants a finding adverse to Ms. Turner with respect to the financial qualifications issue, and he further finds that she is not qualified to be a Commission licensee. Accordingly, the application of Linda Turner d/b/a Turner Broadcasting and Communications will be denied on the basis that Ms. Turner is not financially qualified to be a Commission licensee, and this proceeding will be terminated.

5. IT IS ORDERED that the Mass Media Bureau's Motion for Summary Decision filed on March 22, 1988 IS GRANTED, and the financial qualifications issue designated against Linda Turner d/b/a Turner Broadcasting and Communications IS RESOLVED ADVERSELY to Ms. Turner, and Linda Turner d/b/a Turner Broadcasting and Communications IS FOUND to lack the necessary financial qualifications to be a Commission licensee; and that the hearing scheduled to begin on April 12, 1988 IS CANCELLED.

6. IT IS FURTHER ORDERED that unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion under Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276,[2] the application of Linda Turner d/b/a Turner Broadcasting and Communications (MM Docket No. 86-504, File No. BPCT-860815KF) for authority to construct a new commercial television station on Channel 31, Victoria, Texas IS DENIED, and that this proceeding IS TERMINATED.

7. AND IT IS FURTHER ORDERED that the pleadings set forth below ARE DISMISSED AS MOOT:

**PLEADINGS:**

1. Mass Media Bureau's Second Motion to Dismiss or, in the Alternative to Compel Production of Documents, filed on March 8, 1988.

2. Mass Media Bureau's Motion to Dismiss or, in the Alternative, to Compel Production of Documents, filed on February 10, 1988.

3. Motion to Supplement Production of Documents and Interrogatories, filed by Linda Turner d/b/a Turner Broadcasting and Communications on February 23, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

**FOOTNOTES**

[1] Linda Turner d/b/a Turner Broadcasting and Communications did not file an opposition statement to the Bureau's Motion for Summary Decision filed on March 22, 1988.

[2] In the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In Re Application of

BILL WELCH File No. 00547-CL-TC-1-88

for Commission Consent to Transfer of
Control of the Florence, Alabama
Non-Wireline Cellular Permit to McCaw
Communications of Florence, Inc.

## MEMORANDUM OPINION AND ORDER

**Adopted: April 11, 1988; Released: April 19, 1988**

By the Chief, Mobile Services Division:

1. The United States Independent Cellular Telephone Association, et. al. (USICTA) has filed a petition to deny the captioned application for transfer of control of the Florence, Alabama non-wireline cellular permit to McCaw Communications of Florence, Inc. (McCaw).

2. Bill Welch (Welch), the transferor, has filed an opposition to the petition to deny and McCaw (McCaw), the transferee, has filed an opposition to the petition to deny. USICTA has filed a reply.

## BACKGROUND

3. In its petition, USICTA makes the following arguments: a) that the for-profit sale of the construction permit that is contemplated by the captioned application for transfer is prohibited by Sections 301 and 304 of the Communications Act of 1934, as amended (Act); b) that the transferor has not met its burden of proof pursuant to Section 22.40(b) of the Rules to demonstrate that it was not its intent to speculate in cellular construction permits; c) that McCaw is not financially qualified to be a Commission permittee because the letter McCaw relies on to support its claim of reasonable assurance of funding does not meet the requirements of Section 22.917 of the Rules; d) that the application does not demonstrate that transfer of the permit would be in the public interest and that the applicant has misrepresented the facts in its public interest showing; and e) that McCaw does not possess the character qualifications to be a Commission permittee in the Florence, Alabama market in which it is attempting to buy a stand-alone system because, USICTA alleges, McCaw has engaged in anticompetititve coercive practices to obtain a permit for a stand-alone system in the Chico, California market.

4. In its opposition, Welch and McCaw argue that the USICTA petition is procedurally defective because it has not demonstrated USICTA's own standing or that of its purported members. They argue that the petition has failed to: a) state any objective facts supporting USICTA's claim that the grant of the application would injure it or its purported members and that the injury is protected by the Act, and b) include an affidavit affirming the facts alleged in the pleading to establish injury to USICTA or its purported members, as required by the Act and the Rules. The oppositions argue that USICTA's attack on the Common Carrier Bureau's decision in *Madison Cellular Telephone Co.*, 2 FCC Rcd. 5397 (1987) (*Madison Decision)* is procedurally defective as untimely because USICTA was required by Sections 1.106 and 1.115 of the Rules to file either a petition for reconsideration or an application for review within thirty days of the date of public notice of the *Madison Decision*. The oppositions also include arguments that the proposed transfer is fully consistent with Sections 301 and 304 of the Act, Commission Rules and past precedent; that McCaw has demonstrated that the benefits of its proposed regional systems would serve the public interest; that Welch has met its burden of demonstrating that it was not speculating in cellular construction permits within the meaning of Section 22.40(b) of the Rules; that McCaw is financially qualified to consummate the proposed acquisition; and that McCaw has not engaged in anti-competitive conduct and thus does possess the character qualifications to become a Commission permittee.

5. In its reply, USICTA makes the following arguments: a) that USICTA has standing, both as an association and on behalf of its members, to petition the captioned transfer because it has submitted an affidavit in its reply to demonstrate that it would be injured by this transfer; b) that the sale of this construction permit for profit is prohibited by Sections 301 and 304 of the Act; c) that the transferor has not demonstrated that it obtained the permit with the intent to construct; d) that McCaw's financial qualifications have not been fully demonstrated to be in compliance with the Commission's requirements; and e) that McCaw has failed to make the public interest demonstration required by Section 22.13(a)(4) of the Commission's Rules.

## DISCUSSION

6. The issues raised by USICTA in the case *sub judice* are virtually identical to the issues USICTA raised in *Corpus Christi Cellular Telephone Company* (*Corpus Christi Decision)*, DA 88-428, released April 4, 1988.[1] Thus, for the reasons stated in the *Corpus Christi Decision*, we find that grant of the captioned application is in the public interest.

## ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED, That the application of Bill Welch, File No. 00547-CL-TC-1-88, seeking consent to transfers of control, IS GRANTED.

8. This Order is issued under Section 0.291 of the Commission's Rules and is effective immediately. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order. *See* 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

**FOOTNOTE**

[1] In this case, the declaration submitted by the transferor to support its Section 22.40(b) showing, is different from the declarations submitted in the *Corpus Christi Decision*, and is contested by USICTA. We find the difference to be without distinction. In this case, the declaration indicates that the transferor acquired the construction permit for the purpose of constructing and operating the system, and that its decision to sell was prompted by changing business conditions and its determination that it would not be economical to build the system on a stand-alone basis. We find that this showing also satisfies Section 22.40(b) of the Rules as well as the *Madison* Decision.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

HUGHES COMMUNICATIONS GALAXY INC. File No. I-T-C-84-031

For authority to make available to Turner Broadcasting System, Inc. television channels of communication via the Hughes Galaxy I satellite for transmissions to various transborder locations.

**ORDER AND AUTHORIZATION**

**Adopted: April 8, 1988; Released: April 19 1988**

By the Acting Chief, International Facilities Division:

1. The purpose of this order is to modify the authority previously granted Hughes Communications Galaxy, Inc. (Hughes) to transmit the television programming of Turner Broadcasting System (TBS) to various transborder reception points.[1] Hughes currently holds blanket authority to provide TBS progammming via its Galaxy satellite system to all transborder locations approved as of July, 1987. It now seeks final authority to transmit the TBS Cable News Network (CNN) video service to Columbia and the Turks and Caicos Islands.

2. At the October 1987 INTELSAT Assembly of Parties meeting, Columbia was added to the list of countries consulted under Article XIV(d) for U.S. - Latin American/Caribbean transborder services. The Commission previously withheld final authority for the provision of one-way transborder service to the Turks and Caicos Islands pending clarification by the Department of State of the extent of copyright protection available there.[2] TBS has now certified that it holds the copyright, both domestically and in Columibia and the Turks and Caicos Islands, to all CNN programming and that it is willing to proceed at its own risk with the video transmissions regardless of whether the copyright laws of Columbia and the Turks and Caicos Islands protect CNN transmissions. Based on this certification, the Department of State has informed the Commission that it has no objection to the final authorization of the Hughes application. [3]

3. Accordingly, IT IS ORDERED that the previous authorization of Hughes Communications Galaxy, Inc., application File No. I-T-C-84-031, is modified to authorize the provision of CNN video programming to Columbia and the Turks and Caicos Islands.

4. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules on Practice and Procedure may be filed within 30 days of the date of public notice of this order (see Commission Rule 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] Western Union Telegraph Company *et. al.*, File Nos. I-T-C-83-068 *et. al.* Mimeo No. 3286 (released April 4, 1987); RCA American Communications, Inc. *et. al.*, File Nos. I-P-C-81-038 *et.* al. Mimeo No. 4294 (released May 6, 1985); Hughes Communications Galaxy, Inc., File No. I-T-C-84-031 DA ! 87-967 (released August 4, 1987).

[2] Western Union Telegraph Co., *supra* note 1 at para.18 n. 14.

[3] Letter dated February 3, 1988, from Lucy H. Richards, Director, Office of Planning and Analysis, Bureau of International Communications and Information Policy, to Mr. Joseph A. Godles.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GLOBAL TELEGRAPH CORPORATION — File No. I-T-C-88-001

Application for authority to resell the services of AT&T for provision of facsimile service between the U.S. and Mexico, Guatemala and El Salvador

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: April 8, 1988; Released: April 19, 1988**

By the Acting Chief, International Facilities Division:

1. The Commission is considering the above-captioned application, filed on October 7, 1987 by Global Telegraph Company (GTC), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to resell the switched voice services of AT&T for provision of facsimile service between the U.S., on the one hand, and Mexico, Guatemala and El Salvador, on the other hand. The application was placed on public notice on October 14, 1987. No comments were received.

**DISCUSSION**

2. The majority of recent international resale applications we have granted have been from entities seeking authority to provide international switched voice services through the resale of the international switched voice services of existing international carriers. The subject GTC application differs from these applications in that GTC does not seek authority to resell the international switched voice services of AT&T, to provide international switched voice service but, rather, to provide international facsimile service, a non-voice service. Therefore, the GTC application raises a number of issues which are not present when considering applications for the resale of international switched voice service for the provision of international switched voice service.

3. We first note that AT&T's switched voice tariff does contain a limitation on the use of its Long Distance Message Telecommunications Service (LDMTS) for non-voice transmission to some points. However, none of these points is requested in the instant application.[1]

4. In recent decisions authorizing entities to provide international switched voice service on a common carrier basis by the resale of switched voice services of existing U.S. carriers, we have granted the applicants authority to provide switched voice service by resale to all of the points currently or hereafter listed in the international switched voice service tariffs of the carrier or carriers whose services are being resold. However, we would note that where the service being provided by a resale carrier is the same as that being resold, there is likely to be little, if any, effect on the foreign correspondent of the U.S. carrier whose service is being resold.

5. For example, a telephone call from the United States to another country provided by a carrier reselling the switched voice service of AT&T, MCI, US Sprint or other U.S. carrier is not likely to produce operational or economic effects on the foreign correspondent that differ from those that would occur if the U.S. customer placed the call directly with the U.S. carrier whose service is being resold. Under such circumstances, there would appear to be little or no need for such a U.S. resale carrier to obtain its own operating agreements with the foreign correspondent of the U.S. carriers whose services are being resold. Because of this factor and the fact that the reselling carrier is bound by the terms and conditions of the tariffs of the carriers whose services are being resold, we believe that we retain sufficient control over the resold voice service by means of our control over the authorizations and tariffs of the carriers whose services are being resold.

6. The resale of one international service, such as switched voice service, to provide a different international service, such as facsimile service, as is the case in the instant application could well present a different situation. In such a case, additional or different action or equipment may be required on the part of the underlying U.S. carrier's foreign correspondent. The economic effects of the foreign correspondent might differ. Consequently, it is possible that U.S. resale carriers which resell one international service of an underlying U.S. carrier to provide a different international service may be required to obtain operating agreements or other instruments of authorization by the foreign correspondent or other authorities in some countries.[2]

7. We would also note that its international competitive carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985), the Commission found that each foreign country constituted a separate geographical market. The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country. *See* 102 FCC 2d at p. 828. The Commission further found that non-dominant carriers should be required to receive an initial Section 214 certificate to provide a given service product to a country. *See* 102 FCC 2d at p. 844. We believe that, because of the potential that U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries to which they seek to provide service, it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's international competitive carrier decision. [3] Therefore, we shall authorize GTC to provide service only to those countries specifically listed in its application.

8. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[4] We find that the market will support additional carriers and that the added competition will be in the public interest.[5]

9. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international facsimile service by GTC.

10. Accordingly, IT IS ORDERED that application File No. I-T-C-88-001 IS GRANTED and GTC is authorized to provide international facsimile service by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, between the contiguous United States, on the one hand, and Mexico, Guatemala and El Salvador, on the other hand.

11. IT IS FURTHER ORDERED that copies of any operating agreements entered into between GTC and its correspondents shall be filed with the Commission within 30 days of their execution.

12. IT IS FURTHER ORDERED that GTC shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] While AT&T's tariff generally prohibits non-voice transmissions via LDMTS to Mexico, facsimile transmission is permitted. Therefore, we need not deny GTC's request to provide facsimile service to that country.

[2] For example, in a Memorandum, Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), (MO&A), the Commission, by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The MO&O stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed, pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. 43.51, copies of: a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[3] Because GTC is reselling services rather than acquiring specific facilities, it need not file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. 63.10(b).

[4] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[5] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SYNAPSE TENANT
LEASING, LTD.,
Complainant,

v. File No. E-87-148

UNITED TELEPHONE
COMPANY OF IOWA,
Defendant.

**ORDER**

**Adopted: April 7, 1988; Released: April 19, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 10, 1988, Alan Harr filed a formal complaint on behalf of Synapse Tenant Leasing, Ltd. (Synapse), against United Telephone Company of Iowa (United). Synapse asserted that it was a jointly-owned, non-profit telephone time-sharing operation, and an end user of telecommunications services. As such, it maintained that it was entitled to interstate service from United at B1 (business) rates. United, however, alleged that Synapse was a reseller and should be billed retroactively at interstate FGA (Feature Group A) rates.

2. In a letter dated March 15, 1988, Mr. Harr stated that he wished to withdraw the complaint. Since the complaint involves a private dispute between the parties, consent is hereby given for withdrawal of the complaint.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 1105

Revisions to Tariff F.C.C. No. 1

**ORDER**

**Adopted: March 18, 1988** **Released: March 21, 1988**

By the Chief, Common Carrier Bureau:

1. On January 14, 1988, the American Telephone and Telegraph Company (AT&T) filed the captioned tariff revisions which went became effective on March 14, 1988. AT&T's filing deleted promotional compensation for Dial-It 900 Service information arrangements from its tariff. The 900 Service permits "sponsors" taking service under the tariff to furnish, for a fee, live or recorded messages and information programs. The tariff revision also reduced the initial minute rate of a 900 Service call from $.50 to $.45. AT&T Transmittal at 2. Infotel, Inc. (Infotel), which provides a sports information service using AT&T's 900 Service, submitted a letter opposing the proposed revision, which we construe as a petition to reject or suspend. AT&T filed a reply, and Infotel filed a response.[1]

2. AT&T states that it offered promotional compensation to encourage sponsors to develop, advertise, and promote high call volume programs. AT&T Transmittal at 1. AT&T asserts that this purpose has been achieved, and that it no longer needs to offer the compensation. Customers who currently receive promotional compensation under AT&T's tariff will be required to negotiate a contract with AT&T under its premium billing arrangement, an unregulated offering.

3. Infotel contends that the tariff revisions would cause it considerable financial harm. Infotel Opposition at 1. Infotel explains that 52.5 percent of its gross income in 1987 from its 900 Service offering was directly attributable to second and succeeding minutes, and that those minutes will no longer be compensated under the tariff. *Id.* at 5. Infotel claims that under the premium billing arrangement a program vendor will receive only the premium billing share of 5 cents (the difference between the 50 cents it collects and the 45 cents it pays AT&T) for the first minute of the call, and will receive no compensation for the succeeding minutes, even though AT&T will collect 35 cents for each of these additional minutes.

4. AT&T replies that sponsors do not have a right or a reasonable expectation under the tariff to receive compensation, and that AT&T is not obligated to compensate them. AT&T Reply at 3-4. AT&T maintains that the structure and level of rates for its Dial-It 900 Service are not germane to the instant tariff proceeding. *Id.* at 5.

5. We note that there are a number of complaints on record with the Commission which challenge AT&T's premium billing arrangement. *See* , *e. g.*, Enforcement Division File No. IC 88-00480. A decision to refrain from initiating a Section 204 investigation of Transmittal No. 1105, does not, of course, affect those proceedings. *See* note 1, *supra*.

6. The Common Carrier Bureau has reviewed Transmittal No. 1105, Infotel's opposition and AT&T's reply. We find that Infotel has not presented any compelling argument that the tariff is patently unlawful so as to require rejection, and that an investigation of the revisions is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition filed by Infotel, Inc. against AT&T's Tariff F.C.C. No. 1, Transmittal No. 1105, is DENIED.

8. IT IS FURTHER ORDERED that the response filed by Infotel, Inc. against AT&T's Tariff F.C.C. No. 1, Transmittal No. 1105, IS DISMISSED.

9. IT IS FURTHER ORDERED that the petition to accept late-filed pleadings filed by S.H.L. Enterprises IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTE**

[1] The Infotel response, which is not an authorized pleading under the Commission's Rules, has not been considered in our review of the pleadings. On March 10, 1988 S.H.L. Enterprises (S.H.L.) filed a petition to reject, a petition for stay or suspension and a petition to accept its late-filed pleadings. These pleadings were filed 56 days after AT&T's tariff was filed and only four days prior to its effective date. We deny S.H.L.'s motion to accept its late-filed pleadings because S.H.L. has not shown any good cause for the grant of its request. S.H.L. also filed a supplemental motion on March 11, requesting that its pleadings be construed as an informal complaint under 47 C.F.R. § 1.41. That request is under consideration.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

The BellSouth Telephone Companies — Transmittal No. 143

Tariff F.C.C. No. 2
(Special Construction)

**ORDER**

**Adopted: April 4, 1988; Released: April 5, 1988**

By the Chief, Common Carrier Bureau:

1. On February 16, 1988, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 143 proposing tariff revisions to implement non-recurring charges associated with the special construction of facilities to provide video service for the Democratic National Convention. The Convention will be held in Atlanta, Georgia from July 18 through July 22, 1988. The tariff revisions are scheduled to become effective on April 6, 1988.

2. BellSouth proposes to establish the Democratic National Convention Video Network (DNCVN) by installing single-mode fiber facilities to accommodate the extraordinary demand for 130 convention-related video circuits at multiple sites throughout the Atlanta Metropolitan Area. It would allocate the costs of providing this service among its video customers by special construction charges of $3810 per circuit ordered before April 15, 1988, and $4055 per circuit thereafter.[1] These charges would be assessed in addition to the usual recurring charges for video service.

3. A petition to reject, or alternatively to suspend and investigate, was filed by Capital Cities/ABC, Inc., CBS, Inc., and the National Broadcasting Company, Inc. (the Networks).[2] The Networks characterize the DNCVN as a routine installation of fiber facilities to accommodate future needs because the facilities will be integrated into BellSouth's (Southern Bell's) network within two years of the convention. They therefore contend that special construction charges are inappropriate. Networks Petition at 5-6. The Networks also object to the costs of leasing associated video electronic equipment being included in the proposed charges, arguing that it cannot determine whether leasing is appropriate without additional information about BellSouth's equipment inventory. With these modifications, the Networks calculate that the proposed special construction charges would be reduced to $617 per circuit -- a level they claim is consistent with the usual special construction charges for temporary installation of video service in Atlanta. *Id.* at n.2 and n.17.

4. BellSouth replies that but for the convention, it would not have placed fiber facilities along the included routes during the next two years and that it has minimized the special construction charges by integrating these facilities to the maximum extent possible into its long-term network plans. BellSouth Reply, filed Mar. 14, 1988 at 7. In addition, it states that it will lease only that video electronic equipment for which it has no permanent use or cannot borrow from other telephone companies. *Id.* at 11-12.

5. The Common Carrier Bureau has reviewed the proposed tariff revisions and and responsive pleadings. We conclude that no compelling arguments have been presented that the tariff proposal is patently unlawful so as to require rejection and that no question has been presented that would warrant an investigation at this time.

6. IT IS THEREFORE ORDERED that the petition filed against BellSouth Telephone Companies Tariff F.C.C. No. 2 (Special Construction), Transmittal No. 141, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] The charges primarily reflect the costs of advancing the construction of these fiber facilities to meet the Convention demand and the cost of leasing associated video service electronic units. The lower rate is intended to reflect cost savings possible for early orders.

[2] Petition to Reject or in the Alternative to Suspend and Investigate of Capital Cities/ABC, Inc., CBS, Inc. and the National Broadcasting Company, Inc., filed March 2, 1988 (Networks Petition).

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

## PUBLIC NOTICE

## PLEADING CYCLE ESTABLISHED FOR COMMENTS ON COMPARABLY EFFICIENT INTERCONNECTION PLANS FOR VOICE MESSAGE SERVICE OF BELL ATLANTIC AND SOUTHWESTERN BELL

**Released: April 8, 1988**

On March 30, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed a Comparably Efficient Interconnection (CEI) plan to provide voice messaging services. According to Bell Atlantic, its voice messaging services will provide such features as telephone answering, voice mail and call delivery. On April 1, 1988, Southwestern Bell Telephone Company (SWBT) filed a CEI plan to offer a voice messaging service consisting of telephone answering and voice mail.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, FCC 88-9 (released Feb. 18, 1988)), the Commission must approve the CEI plans before Bell Atlantic and SWBT can begin implementing their proposed services. Bell Atlantic and SWBT state that their CEI plans are identical, in all essential respects, to Pacific Bell's CEI plan, which the Commission has approved (Memorandum Opinion and Order, FCC 88-11 (released Feb. 18, 1988)).

Bell Atlantic and SWBT state that they will account for the joint and common costs of the voice message services pursuant to their Part 32 cost allocation manuals that the Commission has conditionally approved (Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109 (1988), Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 447 (1988)). Bell Atlantic and SWBT also describe their plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file separate comments on each of these plans by *May 4, 1988*, and reply comments by *May* 20, 1988, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each pleading should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of the Bell Atlantic and SWBT CEI plans can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Division of the Common Carrier Bureau, at (202) 632-4047.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-392**

In re Applications of

UN2JC COMMUNICATIONS (LIMITED) File No. BPCT-850611KE

JOSE ANGEL SALCIDO d/b/a SALCIDO BROADCASTING CO. File No. BPCT-850723KE

For Construction Permit
for a New Television Station
El Paso, Texas

**Appearances**

*Stuart B. Mitchell*, Esq., *Carl M. Fielstra*, Esq., *Andrew C. Bisulca*, Esq., and *Wm. Franklin Pugh*, Esq., on behalf of UN2JC Communications (Limited); *Robert G. Allen*, Esq., *Rachel O. Davis*, Esq., and *Douglas W. Harold, Jr.*, Esq., on behalf of Jose Angel Salcido, Jr. d/b/a Salcido Broadcasting Co., and *Arthur I. Steinberg*, Esq., on behalf of the Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK**

**Issued: March 30, 1988; Released: April 20, 1988**

## PRELIMINARY STATEMENT

This proceeding involves the mutually exclusive applications of UN2JC Communications (Limited) (UN2JC), and Jose Angel Salcido, Jr. d/b/a

Salcido Broadcasting Co. (Salcido) for a construction permit for a new commercial television station on Channel 65 to serve El Paso, Texas.[1]

1. By *Hearing Designation Order* (HDO), and by subsequent orders of the Presiding Judge, UN2JC and Salcido were designated for hearing on the following remaining issues:[2]

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest;

(2) To determine whether the real party-in- interest behind the application of UN2JC is Pete Warren, Alex Blomerth, Missionary Radio Evangelism, Satellite Technology for Christ, or Warren Electronics (or any combination of those parties);

(3) To determine whether UN2JC has sufficient resources to construct the proposed station and operate it for three months;

(4) To determine whether UN2JC lacked candor or misrepresented facts to the FCC when it certified it was financially qualified;

(5) To determine, in light of the evidence adduced with respect to the foregoing issues (3) and (4), whether UN2JC has the requisite basic qualifications to be a Commission licensee; and

(6) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A pre-hearing conference was held on March 3, 1986. Hearing was held on July 21 and 22, 1986; December 9, 10, and 11, 1986; and March 2, 3, 4, and 5, 1987. The record was closed March 5, 1987.

## FINDINGS OF FACT

*Real - Party - In - Interest - UN2JC*

3. UN2JC is a Texas limited partnership. It is owned by Sara Diaz Warren, 20 percent general partner and by its limited partners, Sara Diaz Warren 26 2/3 percent, Peggy Brown 26 2/3 percent, and Jan Blomerth 26 2/3 percent (UN2JC Ex. 4, p. 2; UN2JC Ex. 4, Att. 2).

4. By the terms of a limited partnership agreement dated September 12, 1986, Sara Diaz Warren, the sole general partner, is specifically authorized in her capacity as general partner, to exercise management of the partnership and its business. With the exception of Sara Diaz Warren acting as general partner, the limited partners are expressly precluded from exerting any management control over the partnership, nor shall be paid any salary (UN2JC Ex. 4, Att. 2).

5. Sara Diaz Warren is the proposed general manager for UN2JC. She has extensive broadcast experience. From 1973 through 1978, she served as a talent scout for live interview programs and entertainment programs produced by Missionary Radio Evangelism (MRE) in El Paso. She was an on-air television personality on MRE programs one to two hours per week, and served as camera operator, audio operator, video level operator and telephone counselor for an average of four hours per week. During 1979-1980, she worked six to seven hours per week for KCIK-TV, Channel 14, El Paso in many of the same capacities and served as a co-host for live English and Spanish television productions. In 1981, she became the owner of K63CD, Channel 63, Alamogordo, New Mexico and served as the general manager until 1983 (UN2JC Ex. 1, pgs. 2-3). For the first six months of operation at K63CD she worked 60 hours per week.

6. MRE is a non-profit corporation (Tr. 574). It does business under a variety of business names including Satellite Technology for Christ (STC), Manna Ministries, Life Scope and Family Restoration Ministries (*Id.*).

7. Warren Electronics Systems (WES) is a wholly-owned corporate subsidiary of MRE. WES is a for-profit corporation (*Id.*). WES was originally a privately owned partnership consisting of members of Pete Warren's family (Tr. 575). The Warren family business, Warren Electronics Systems Partnership (WESPART), was engaged in consult-

ing and engineering and electronic equipment sales (Tr. 576). The business also did some commercial production, weddings and church specials (Tr. 352). It had camera, recording and editing equipment. WESPART became a corporate subsidiary of MRE in 1983 or 1984 (Tr. 578-579).

8. Pete E. Myrl Warren III is the husband of Sara Diaz Warren, the general partner of UN2JC (UN2JC Ex. 4, pg. 4, Tr. 573). He is also the Vice President and Director of MRE (Tr. 574). Mr. Warren first became affiliated with MRE as a volunteer sometime in the 1970's (Tr. 579).

9. In approximately 1976, MRE became the licensee of KCIK-TV, El Paso, Texas (Tr. 580). When MRE first started KCIK-TV, WESPART donated to it videotape recorders, monitors, cameras and other electronic parts (Tr. 576). The value of this equipment amounted to $30,000 (Tr. 577).

10. Mr. Warren first became a paid employee of MRE after it received a construction permit for KCIK-TV, although he continued to rely on WESPART as his primary source of income (Tr. 581).

11. Mr. Warren also serves as the President and board member of WES (Tr. 584).

12. Mr. Warren is a recognized expert in the matters of application for, construction of, and early stage operations of UHF television stations (Tr. 1010). Mr. Warren is also an expert in the appraisal of communications sites and the technical operation of broadcast equipment (Tr. 1004 and Tr. 1793).

13. E. Alex Blomerth is the husband of UN2JC limited partner Jan Blomerth (UN2JC Ex. 4, pg. 2). Mr. Blomerth is the senior operating officer for MRE (Tr. 834) and a member of its Board of Directors (Tr. 584).

14. At the time UN2JC filed its broadcast application its general partner Sara Warren, personally conducted a broad range of activities on behalf of UN2JC including: obtaining a site lease (Tr. 46), developing a staffing plan (Tr. 48), planning the programming (*Id.*), planning the hours of the station's operation (*Id.*), determining financial qualifications (Tr. 50), reviewing the balance sheets of the partners (*Id.*), selecting engineer and legal counsel for the applicant (*Id.*), completing the application (Tr. 51), setting up bank accounts for the applicant (Tr. 52), making herself the sole signatory on those bank accounts and maintaining the corporate books (*Id.*), overseeing partnership meetings (Tr. 55), contacting local programmers (Tr. 56) and obtaining a chief engineer for the station (Tr. 93-94).

15. Pete Warren has worked as a consultant to UN2JC in connection with the preparation of its application. He has not been paid for those services, having done them free of charge (Tr. 702). Mr. Warren has provided free consulting services to broadcast applicants other than UN2JC, including one or two full power stations, three or four radio stations and a great number (20-40) of low power television applicants. Mr. Warren does not have any ownership interest or control over the operations of any of those clients for whom he has rendered free consulting services (Tr. 789). He does not own any broadcast stations (Tr. 90). Mr. Warren does not plan to work at the proposed UN2JC proposed facility, nor does he plan to install any of the equipment (Tr. 1800). Mr. Warren travels extensively on his job and is out of El Paso more than half of the days of the year (*Id.*). Mr. Warren does not desire to be involved in the operation of a television broadcast station (UN2JC Ex. 4, pg. 6). Mr. Warren at UN2JC Ex. 7 supplied the record with his statement of position. Without implying that any ownership or control over UN2JC ever existed, Mr. Warren disclaimed any past, present or future ownership of any sort in UN2JC and any control of any sort over UN2JC.

16. In rendering free services for UN2JC and other clients, Mr. Warren has utilized the conveniences of office equipment, supplies and services at his work place, the offices of MRE, STC and WES (Tr. 770-775).

17. Mr. Warren has waived all community property rights to any funds, equipment or other assets that may be utilized by Sara Diaz Warren in conjunction with UN2JC (UN2JC Ex. 7, para. 11).

18. E. Alex Blomerth is the husband of UN2JC's limited partner, Jan Blomerth (UN2JC Ex. 4, pg. 2). Mr. Blomerth is a professional associate to Pete Warren and the senior operating officer for MRE. Sara Diaz Warren does not enjoy any working relationship with Mr. Blomerth (UN2JC Ex. 4, pg. 3, Tr. 834). The record does not show any connection between Mr. Blomerth and UN2JC other than Mr. Blomerth's providing a statement disclaiming any past, present or future ownership of any sort in UN2JC and any control of any sort over UN2JC (UN2JC Ex. 8).

19. Sara Diaz Warren has utilized the offices of MRE, where her husband works, as a repository for the UN2JC public file. She utilized it because the offices are conveniently located in the city and maintain regular office hours (UN2JC Ex. 4, pg. 5). Other than minor services of *de minimis* economic value for which reimbursement was made (Tr. 773), there is no record evidence of any business relationship between UN2JC and MRE or WES, except for the lease of UN2JC's transmitter/antenna site.

20. MRE and WES are joint lessors of the transmitter and antenna site which is proposed by UN2JC (UN2JC Ex. 4, Att. 1). The tower proposed by UN2JC is owned by WES, which in turn, is wholly-owned by MRE (Tr. 583). The transmitter building proposed by UN2JC is owned by MRE (Tr. 583-84). The lease agreement is a standard lease agreement and specifically provides that MRE will not exercise any control over UN2JC's television broadcast station (UN2JC Ex. 4, Att. 1, pg. 7, para. 15).

21. With the exception of the limited rights which they have under the above-named lease, MRE and WES have completely disclaimed any rights of ownership or control in any form over UN2JC (UN2JC Ex. 7, para. 3-8; UN2JC Ex. 8, para. 3-8). [3]

22. UN2JC's communications counsel also has represented Sara Diaz Warren individually since February, 1981 (Salcido Ex. 17, pg. 1; Tr. 329). Although the same firm has represented MRE, it first represented MRE in the spring or summer of 1982 (Tr. 763).

***Misrepresentation of Financial Qualification Issue - UN2JC***

23. At the time of the filing of its application UN2JC had estimated that the cost of construction and the cost of initial three months operation of its proposed station would be $654,123 (Tr. 1052, 1276, 1691).

24. The cost estimates were compiled by UN2JC's general partner (Tr. 1052, 1064, 1065, 1272-1276). The breakdown of total costs is as follows. The costs of RF generating equipment and the antenna system were $400,003 to one supplier, and a total $20,000 to two other suppliers (Tr. 1069, 1071, 1255, 1273; Salcido Ex. 43, pg.

53). The cost of program origination equipment was $130,000 (Tr. 1274). Legal costs were $20,000, prepaid (Tr. 1275). Engineering costs were $5,000 (*Id.*). Installation costs were $30,000 (*Id.*). Operation costs were estimated at $52,000 (*Id.*).

25. In support of the adequacy of its estimated costs, UN2JC produced the testimony of two experts experienced in the development of similar broadcast stations (Tr. 1751-1762, 1800). The competing applicant Salcido countered with an expert of his own who admittedly had never built or operated a television station. It was her opinion that an additional $132,636 would have been needed by UN2JC to construct and operate the proposed station (Tr. 1691).

26. Prior to the filing of the UN2JC application, UN2JC's general partner had made arrangements for credit to be available to UN2JC for the purchase of its equipment (Salcido Ex. 43, pg. 53, 79; Tr. 1259-1260, 1295). The credit available was $400,003 from Townsend Associates, Inc. (Tr. 1273; Salcido Ex. 43, pg. 53); and $72,650 from Michael D. Gaglio (Salcido Ex. 43, pg. 79). Indeed, Salcido's expert, Susan D. Harrison, agreed that based on her analysis the net credit available to UN2JC from equipment suppliers was $469,412 (Tr. 1702).

27. Based on its original cost estimate of $654,123 and available credit of $472,653, UN2JC at the time of certification needed capital in the amount of $180,000 (Tr. 1053). This amount was to be supplied by UN2JC's limited partners as needed (Tr. 91-92).

28. At the time of the certification, all five original limited partners of UN2JC had executed the Agreement of Limited Partnership, dated February 28, 1985 (Salcido Ex. 42). Concurrently, all five limited partners had placed interlinear initials on the limited partnership agreement indicating the existence of additional agreements outside the limited partnership agreement (Salcido Ex. 42, pg. 2). Affidavits from four of the original five limited partners have been made part of the record indicating the agreement that each of the limited partners was committed to support the UN2JC proposal up to $500,000 without reservation, and that the commitments were not *pro rata* (Salcido Ex. 43 pgs. 56-73). It was the understanding of the general partner, Mrs. Warren, that should any one limited partner put in more than her *pro rata* share of the total capital needs of the project, she would be compensated either by having the amount treated as a loan and being paid back some time later when the partnership could pay her back or that she would be able to treat the contribution as additional equity and, therefore, obtain a larger percentage share of the partnership's business (Tr. 1269).

29. The general partner, Mrs. Warren, had reviewed the balance sheet of each of the limited partners prior to certification (Tr. 50, 1148-1150). Mrs. Warren was personally acquainted with each limited partner (Tr. 53-55). Salcido's expert, Ms. Harrison, also evaluated three of UN2JC's limited partners' capabilities to meet their respective commitments. The expert was of the opinion that UN2JC limited partner, Peggy Brown, was capable of covering the full amount of what she (the expert) thought was required (*i. e.*, $317,347) (Tr. 1709). Ms. Harrison also testified that in her opinion limited partner Jan Blomerth could, if necessary, pay $177,366 of the amount that would be required (Tr. 1711) and that limited partner Sara Warren could cover from liquid resources $66,000 (Tr. 1719). Ms. Harrison went on to say that for the shortfall between the $66,000 of liquid capital available to Mrs. Warren and her *pro rata* share of the funds required ($317,347), Mrs. Warren's non-liquid assets had sufficient value to meet her full *pro rata* share of the obligations (Tr. 1735).

*Financial Qualifications Issue - UN2JC*

30. UN2JC's current financial proposal to prosecute its application, construction of the proposed station and operate it for three months without revenues is $543,733 (Tr. 1280-1281). Two experts testified that UN2JC's cost projections were sufficient and that accomplishment of the UN2JC proposal was feasible at this cost level (Tr. 1756-1757, 1761, 1800-1801). Salcido's expert, Ms. Harrison, found that UN2JC's proposal fell short of her projections by $132,636 (Tr. 1691). Ms. Harrison's projections were subsequently reviewed by Mr. Arthur Malendoski, an expert with some 35 years of experience in UHF television broadcast operations (Tr. 1743-1745, UN2JC Ex. 21). He concluded that Ms. Harrison's estimate of costs for operations and cost of legal assistance and personnel were overly high (Tr. 1756-1766). Ms. Harrison's equipment proposals were reviewed by technical expert, Pete Warren, who testified that the additional equipment items which were recommended by Ms. Harrison either had been included in the UN2JC's cost estimate of $543,733 or were items that were technically not needed for the operation of the station (Tr. 1795-1800).

31. To meet the estimated cost of $543,733, UN2JC's general partner will rely in part on the available equipment credit in the amount of $387,759 (Tr. 1703). The balance of the resources needed, $155,974, is to be supplied by the limited partners of UN2JC.

32. The UN2JC partners have committed resources to fulfill the capital requirements of UN2JC (Tr. 90-92, Salcido Ex. 43, pgs. 56-73, Tr. 1054, 1265-1269). The financial balance sheets of the limited partners of UN2JC were provided to the record and reviewed by Salcido's expert Susan D. Harrison. In addition to the liquid capital available on the face of the financial statements, the limited partners of UN2JC have provided their commitments to sell or encumber non-liquid assets in order to meet all of the capital requirements of UN2JC should that be necessary (Salcido Ex. 43, pgs. 56-73).

33. In analyzing the financial statements of UN2JC's limited partners, Ms. Harrison determined that limited partner Peggy Brown could, standing alone, if necessary, pay all of the capital requirements at the highest level that were estimated by Ms. Harrison (Tr. 1709). It was also determined by Ms. Harrison that UN2JC limited partner Jan Blomerth could pay from her liquid assets as much as $177,366 of the capital requirements of UN2JC (Tr. 1709). In was further determined by Ms. Harrison that UN2JC's limited partner, Sara Warren, between her assets and the usable equipment that she would furnish to the partnership could furnish up to $66,000 of the capital requirements of UN2JC (Tr. 1719). It was finally determined by Ms. Harrison that should a requirement of *pro rata* contribution be imposed on the UN2JC limited partners, and it be necessary for UN2JC to come up with the funds to meet the highest cost projection Ms. Harrison thought reasonable, that, nevertheless, UN2JC's limited partner Mrs. Warren had sufficient assets, as evidenced by her financial statement, that she could liquidate by selling or encumbering to come up with any amount of shortfall to pay her *prorata* share of the maximum projected costs of

UN2JC (Tr. 1735). Mrs. Warren has pledged to encumber non-liquid assets, if necessary, to meet her obligations (Salcido Ex. 43, pg. 56).

*Standard Comparative Issue*

*UN2JC*

34. UN2JC has no attributable broadcast interests (UN2JC Ex. 2). None of UN2JC's partners presently hold any attributable interests but at the "B" cut-off date (September 13, 1985), Sara Warren was the licensee of a low power TV station at Alamogordo, New Mexico (UN2JC Ex.1, pg. 3; Salcido Ex. 21; Tr. 81), and was the licensee of a translator in Timberon, New Mexico (UN2JC Ex. 1, pg. 3; Salcido Ex. 22; Tr. 71). Mrs. Warren divested herself of these interests to Vision Broadcasting, Inc. (Vision) in December of 1985 (UN2JC Ex. 1, pg. 3; Salcido Exs. 21, 22; Tr. 74-75).

35. Mrs. Warren's husband, Pete Warren, is the Vice President and a director of Vision (UN2JC Ex. 1, pg. 3; UN2JC Ex. 4, pg. 7). Vision is a non- profit, non-stock corporation. Mr. Warren serves as one of seven directors (UN2JC Ex. 1, pg. 3). He allows his home to be used as the Texas registered office of the corporation. He is not involved in the day-to-day operations (Tr. 750, 798).

36. Sara Warren is UN2JC's sole general partner. UN2JC has three limited partners (UN2JC Ex. 4, pg. 1).[4] In the event of a grant, Mrs. Warren will be the general manager working full time at a minimum of 40 hours per week (UN2JC Ex. 1, pg. 1; Tr. 61-63).

37. Mrs. Warren has prior broadcast experience. She served as the general manager of television broadcast facility K63CD, Channel 63, Alamogordo, New Mexico. During the time the station went on the air she continued as general manager, hosted live programs and established and maintained community relations for the station. Prior to her working at station K63CD, Mrs. Warren worked at television station KCIK, Channel 14, El Paso, Texas.

38. Mrs. Warren has been a long-time resident of El Paso, Texas (Tr. 77). She has been actively involved in civic activities within the city of El Paso, Texas, including: support of the March of Dimes; Easter Seals and Muscular Dystrophy Foundation; extensive involvement as a foster parent in a foster parent program; and extensive support of the Hispanic community in El Paso, including services as a counselor and speaker at various meeting (UN2JC Ex. 1; Tr. 77-79). Mrs. Warren's civic involvement in El Paso covers a period of 12 years (UN2JC Ex. 1).

39. Mrs. Warren is a female and of Hispanic heritage.

*Salcido*

40. Jose Angel Salcido, Jr. d/b/a Salcido is an individual applicant. Jose A. Salcido is the 100 percent owner of the applicant (Salcido Ex. 9).

41. Mr. Salcido will work at the television station full time (at least 40 hours per week) as the general manager (Salcido Ex. 6; Tr. 200-201). He will resign from his present employment in the event he receives a grant (Salcido Ex. 6; Tr. 189). He is the pastor of the Centro Vida Church (Tr. 208).

42. During the period from 1976 to 1982, Mr. Salcido served as a member of the board of directors of KCIK TV, El Paso, Texas. Mr. Salcido dealt with the administration and decision-making process of the station, community relations, and fund-raising for the station. In addition, Mr. Salcido produced his own program and directed the station's counseling center during his television program. In addition, Mrs. Salcido hosted four broadcast programs, one television and three radio, in the greater El Paso area (Salcido Ex. 5, pgs. 4-5).

43. Mr. Salcido is a long-time local resident of the city of El Paso and has extensive civic activities in the community (Salcido Ex. 5. pg. 1-5).

44. Mr. Salcido is a Hispanic person (Salcido Ex. 5, pg. 1).

*Comparative Coverage*

45. The following are the total areas and populations which the applicants will cover within their respective grade B contours (Joint Ex. 1):

| Applicant | Population | Area (Sq. Mile) |
|---|---|---|
| UN2JC June 11, 1985 Proposal | 565,054 | 5,304.8 |
| Salcido July 23, 1985 Proposal | 569,381 | 5,902.2 |
| Salcido September 23, 1985 Proposal | 504,542 | 3,316.2 |
| Salcido August 20, 1986 Proposal | 498,206 | 2,468.9 |

46. The following are the areas and populations to which the applicants will provide a third, fourth, fifth or sixth greater television service (Joint Ex. 1):

| Number of Existing Services | Population | UN2JC Area (Sq. Mile) |
|---|---|---|
| 0 | 0 | 0 |
| 1 | 0 | 0 |
| 2 | 4 | 23.4 |
| 3 | 1,916 1,152.0 | |
| 4 | 1,103 | 499.3 |
| 5 or more | 65,346 | 1,343.3 |

| | Population | Salcido Area |
|---|---|---|
| 1 | 0 | 0 |
| 2 | 0 | 0 |
| 3 | 0 | 0 |
| 4 | 0 | 0 |
| 5 or more | 0 | 0 |

47. An air hazard issue was specified against Salcido in the *HDO*. Subsequent to the "B" cut-off date, but prior to the release of the *HDO*, on September 23, 1985, Salcido amended his second proposed site. At no time did Salcido receive FAA clearance for the second proposed site. On August 20, 1982, Salcido amended his final proposed site.[5]

## CONCLUSIONS

*Real Party - in - Interest Issue*

48. Salcido had alleged that Alex Blomerth, Pete E. Myrl Warren, III, Satellite Technology for Christ and Missionary are the real parties-in- interest in the UN2JC application. Salcido acknowledged that the established test for determining whether a person is a real party-in-interest is "whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station." (*KOWL, Inc.*, 49 FCC 2d 962, 31

RR 2d 1589 (Rev. Bd. 1974)). Salcido also notes that the Commission places an extremely heavy burden on the proponent of a real party- in-interest allegation in the face of a family situation (see, *e. g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 53 RR 2d 953 (Rev. Bd. 1983); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983); *Northeast Oklahoma Broadcasting, Inc.*, 42 FCC 2d 237, 27 RR 2d 524 (Rev. Bd. 1973); *Corvallis Broadcasting Corp.*, 25 RR 2d 824 (Rev. Bd. 1972)).

49. Salcido alleges that he has met his burden of proof on the party-in-interest issue if the "decision concerning whether such interest does, in fact, exists (is) based on an analysis of the totality of the facts of record." Salcido draws the following scenarios:

(a) The Warrens were first involved in a family electronic business which engaged in providing consulting and engineering services in some electronic equipment sales. According to Salcido, Sara Warren only played a passive role in this family business and is likely to continue playing a passive role in whatever business she and her husband may be involved.

(b) When, in 1982, Mrs. Warren became the licensee of low power TV station K63CD, Alamogordo, New Mexico, she did not have the intent to be a permanent licensee. According to Salcido, Mrs. Warren acted as a front for Vision (the eventual assignee). Salcido bases this conclusion on the fact that Vision solicited funds over K63CD. Salcido notes that Pete Warren and Sara Warren were Vision's President and Vice- President, respectively, and Vision's Board of Directors included Pete Warren's mother and three MRE employees. In addition, Vision's business office of record was the Warren's residence.

(c) According to Salcido its charge that it was Vision which was in control of K63CD from the beginning is further proven by the fact that Mrs. Warren's recollections at the hearing about the early operation of K63CD were hazy and incomplete. Salcido believes that this discredits Mrs. Warren's claim of having been integrated into management.

(d) Salcido also notes that Pete Warren did the consulting engineering work for K63CD free of charge and that Alex Blomerth of MRE in a magazine publication took credit for putting K63CD on the air. This proves to Salcido that Pete Warren and MRE simply used Sara Warren's name to secure the FCC license.

(e) The U.S. Forest Service's Special Use Permit for the use of the Alomogordo transmitter site was made out to "KCIK-TV (Sara Diaz Warren)." Salcido claims that this provides the documentary nexus between MRE and K63CD.

(f) An application for an LPTV license at Ochlocknee, Georgia listed Sara Warren as having a 20 percent interest. At hearing, Mrs. Warren was at a loss to explain why she was so listed and denied ever having been personally approached about acquiring an interest. Salcido argues that her denial did not answer the question of whether someone else acquired that interest in her behalf.

(g) Pete Warren and Alex Blomerth conspired to have MRE refuse Salcido permission to rent its transmitter site so that UN2JC, which they controlled, would have a better chance to receive the license.

(h) According to Salcido, Pete Warren's gift of $30,000 worth of electronics equipment to MRE without claiming a tax deduction leads to the inescapable conclusion that Pete Warren's personal and family ventures are inextricably entangled.

(i) Finally, Salcido states that the fact that MRE pays the mortgage on the Warren family residence as a tax-exempt allowance to Pete Warren by virtue of his status as an ordained minister establishes conclusively that no arms-length relationship exists between MRE and Sara Warren.

50. All of the preceding Salcido allegations only amount to rank speculation. Each alleged incident either has been satisfactorily explained by UN2JC witnesses, or, standing alone, is of no consequence. The explanations made Salcido overlooks or conveniently rejects as untrue. Yet, the testimony of UN2JC witnesses is worthy of full credit. The Presiding Judge has observed the demeanor of each and has found each to be trustworthy of belief. Salcido's case against UN2JC rests on innuendo and Salcido falls far short of meeting its burden of proof. MRE had reason enough to turn down Mr. Salcido as a tenant for its transmitter site. There was no need for its officers to have colluded to deprive Mr. Salcido of some imagined right to lease. Nor is there anything sinister about Pete Warren performing consulting services free of charge for his wife, especially since he performed the same services for other applicants in various proceedings. In any event, the record is clear that Mr. Warren is a busy engineer who spends about half his time on the road.

51. Based on the rationale of the Commission precedent cited above, it must be concluded that Sara Diaz Warren is in sole control of the management of the proposed UN2JC station. No where in the record is any substantial allegation of ownership of any interest in UN2JC by any of the alleged real party-in-interest shown to exist. Even the imputed ownership under the community property statutes do not give rise to a real party-in-interest for two reasons. One, the assets being invested by the partners of UN2JC are their own separate estates or are property as to which the spouse has waived his community rights. Also, the applicant here, UN2JC, is not looking to any of the alleged real parties-in-interest for any of its financial support. It is noted that even the tower site lease with the alleged real parties-in- interest is at arms-length with a commercially reasonable rate of interest. Furthermore, each and every one of the alleged real parties-in-interest in this case has fully, completely and in legally binding form knowingly disclaimed and disavowed any ownership interest in the applicant UN2JC and any power to exercise control over it.

52. In sum, it is concluded that neither Alex Blomerth, Pete Warren, Missionary Radio Evangelism, Satellite Technology for Christ, nor Warren Electronics System, nor any combination of the foregoing is a real party-in- interest to the application of UN2JC. UN2JC is a limited partnership operating under the exclusive control of its sole general partner, Sara Diaz Warren, and no person(s) other than its

general partner and its fully disclosed limited partners have been shown to have any ownership interest in UN2JC.

*Financial Certification Issue - UN2JC*

53. At the time UN2JC filed its application its estimate of the construction costs and initial three months operational costs was $654,123. At hearing Salcido's financial expert was of the opinion that a reasonable cost estimate should have been placed at $786,759. UN2JC produced two experts who were of the opinion that UN2JC's initial estimate of construction and operation costs was reasonable. In any event, subsequent to the enlargement of issues in this proceeding, UN2JC's final estimate of construction and operation costs was actually lowered, indicating that its original estimate was indeed reasonable. To meet these anticipated costs, Mrs. Warren had obtained reasonable assurance from the limited partners of UN2JC of the availability of their anticipated capital contributions. She had reviewed appropriate documentation upon which she placed her reliance.

54. Each of the limited partners of UN2JC had bound herself to the limited partnership agreement prior to the certification of the application and had indicated the existence of additional agreements in addition to the partnership agreement, which additional agreements bound all of the limited partners to make sufficient capital contributions to ensure that the financial requirements of the applicant were met.

55. The record further reflects that Mr. Warren released any claim to community property interest in the station or property. Mr. Warren stated under oath and by a sworn statement of position that he has waived any and all of his community rights as to any equipment or funds or other assets which Sara Warren may deem appropriate to invest in UN2JC. All of the assets of the Warren's joint balance sheet are available for Mrs. Warren to rely upon for the proposed station. Reliable indications of value of major items of that property were supplied. The valuation of the broadcast equipment was confirmed by expert witness Pete Warren. The valuation of the communications site was confirmed by expert witness Pete Warren. The valuation of other assets and the assurances that there would be sufficient liquid capital upon sale of those assets was confirmed by Salcido's expert witness, Susan D. Harrison. Mrs. Warren's willingness to convert any of her non-liquid assets and her husband's assets in such conversion were demonstrated on the record.

56. In sum, it must be concluded that UN2JC did not misrepresent its financial qualifications when certifying its application to the Commission.

*Financial Qualification Issue - UN2JC*

57. UN2JC has demonstrated that its present projected costs for the construction and initial three months operation of the proposed station total $543,733. The record indicates that UN2JC has available to it a net equipment credit of $387,759. The record further indicates that UN2JC has available to it as much as $288,610 from limited partner Brown, $177,366 from limited partner Blomerth and $66,000 from limited partner Warren. Limited partner Warren's contributions would be in both cash and usable broadcast equipment. Thus, UN2JC has available to it not less than $919,735 ($531,976 cash plus $387,759 equipment credit) to meet the projected costs of $543,733.[6]

58. It is concluded that UN2JC is financially qualified.

*Standard Comparative Issue*

*Diversification*

59. *UN2JC*. At the "B" cut-off date Sara Warren was the licensee of a low power TV station at Alamogordo, New Mexico and the licensee of a translator station in Timberon, New Mexico. Although Mrs. Warren divested herself of these interests to Vision shortly after the "B" cut-off date, they are, nevertheless, by Commission precedent attributable to her for diversification purposes in this proceeding. Furthermore, Mrs. Warren's husband, Pete Warren, is one of the seven directors and an officer of Vision. These interests, therefore, are subject to spousal attribution. It is to be noted, however, that Mr. Warren has no ownership interest in either licensee, is not involved in day-to-day operations of Vision and does not control the day-to-day programming decisions of Vision. Alamogordo is located over 80 miles from El Paso and is in a state other than the one in which the community of license is located.

60. In *Mark L. Wodlinger*, 101 FCC 2d 762, 58 RR 2d 1006 (Rev. Bd. 1985) only minimal weight for diversification purposes was given the ownership of a low-power television station located many hundreds of miles from the proposed community of license. No greater weight is warranted herein because there is nothing in the record to indicate that the Alamogordo television station could have any significant diversification impact. As for the translator station in Timberton, New Mexico, it is noted that in *Reginald A. Fessenden Educational Fund, Inc.*, 59 RR 2d 1255 (Rev. Bd. 1985), it was held that LPTV stations are more significant from the standpoint of diversification than are translator stations.

61. In light of the foregoing, UN2JC only will be assessed a very slight diversification demerit for the media interests listed above. As for Mrs. Warren's several other potential low power television expectancies, Mrs. Warren has stated her commitment to divest any of those interests which shall have ripened in the event UN2JC is granted a construction permit herein.

62. *Salcido*. Mr. Salcido has no interest in any radio, television, or other media communications entity.

*Integration*

63. *UN2JC*. UN2JC is a Texas limited partnership. According to UN2JC's amended partnership agreement Sara Warren is the sole general partner with total management authority and responsibility for the partnership. Mrs. Warren proposes to work 40 hours or more per week at the station as the general manager. UN2JC is entitled to 100 percent full time integration credit.

64. Mrs. Warren's 100 percent integration proposal is enhanced by her past broadcast experience, her past, present and proposed local residence, her civic participation, her minority status and female ownership.

65. *Salcido*. Salcido's 100 percent owner, Jose Angel Salcido, Jr., proposes to work 40 hours per week at the station as general manager. Salcido is entitled to 100 percent full time integration credit.

66. Salcido's 100 percent integration proposal is enhanced by Mr. Salcido's local, past, present and proposed future residence, his civic participation, his past broadcast experience and his minority status. Mr. Salcido seeks credit for past broadcast experience by virtue of his serving as director of KCIK, Channel 14, El Paso, Texas and his non-management related production of programming and related counseling. This experience is not as extensive as that of Mrs. Warren who constructed and operated a low power television station in Alamogordo, New Mexico.

*Comparative Coverage Issue*

67. The comparison of coverage is based on UN2JC's June 11, 1985 proposal and Salcido's August 20, 1986 proposal. The coverage proposed by Salcido's July 23, 1985 proposal was downgraded by subsequent amendment. Salcido's September 23, 1985 amendment did not have FAA clearance.

68. Based upon the foregoing, UN2JC will cover 72,817 (14.8 percent) more persons than Salcido, and 3,314.8 (166 percent) more square miles than Salcido. In addition to this greater overall coverage that UN2JC attains, UN2JC's proposal provides a third television service to population of four in an area of 23 square miles; a fourth television service to a population of 1,916 in an area of 1.152 square miles and a fifth television service to a population of 1,103 in 499.3 square miles. UN2JC further provides additional television service to 65,346 persons who are already receiving five or more television services not served by the Salcido proposal. Salcido's proposal does not serve any underserved areas of people.

69. UN2JC's advantage in overall coverage is enhanced by its providing a new third, fourth and fifth service. (*Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87 (Rev. Bd. 1984)). By reason of its greater coverage, UN2JC is entitled to a slight comparative preference.

**Ultimate Conclusions**

70. Both applicants are basically qualified to be licensees of the Commission. Both applicants are entitled to 100 percent integration credit. UN2JC's integration is superior to that of Salcido because of Mrs. Warren's more extensive broadcast experience and her female status. Additionally, UN2JC is entitled to a slight comparative preference because of its superior comparative coverage. UN2JC is assessed a very slight diversification demerit but this has been more than offset by UN2JC's greater enhancement of its integration proposal and its greater comparative coverage. UN2JC's proposal, on a comparative basis, better serves the public interest and its application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of UN2JC Communications (Limited) (File No. BPCT-850611KE) for authority to construct and operate a new television station on Channel 65 at El Paso, Texas, IS GRANTED; and the application of Jose Angel Salcido d/b/a Salcido Broadcasting Co. (File No. BPCT-850723KE) IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

**FOOTNOTES**

[1] Initially this proceeding involved two additional applicants who were dismissed with prejudice prior to hearing, to wit: Liquico Television, Limited (see *MO & O*, FCC 86M-1881, released June 6, 1986) and Josie Moore (see *MO & O*, FCC 86M-1044, released March 24, 1986).

[2] Two designated issues have already been resolved in favor of Salcido, to wit: an air hazard issue, resolved by *MO & O*, FCC 86M-3546, released December 8, 1986, and a Section 73.685 shadowing issue, resolved by *MO & O*, FCC 86M-3545, released December 8, 1986.

[3] MRE, however, has had business relationships with UN2JC's competing applicant Mr. Salcido. Mr. Salcido was a director of MRE in 1981. It was in 1981, while Mr. Salcido was director that station KCIK-TV under MRE management slumped into a negative (deficit) fund balance (Salcido Ex. 31 (Rebuttal), pg. 39). Additionally, there had been some confrontation of Mr. Salcido by MRE about Mr. Salcido's alleged bad debt he owed MRE (for his own programs) (Tr. 709). MRE also charges Mr. Salcido with an extremely anti-Catholic bias (Tr. 708).

[4] In September, 1986, UN2JC's Limited Partnership was amended to clarify restrictions on limited partners' involvement in light of the then recently issued opinion in *Cotton Broadcasting, Inc.*, 60 RR 2d 982, 104 FCC 2d 473 (Rev. Bd. 1986).

[5] Salcido's amendment filed August 20, 1986, was accepted by *MO & O*, FCC 86M-2859, released September 18, 1986.

[6] The amount available is adequate to meet anticipated costs even if the costs were increased by $132,636 as suggested by Salcido's expert witness Susan D. Harrison.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-164**

In the Matter of

Amendment of Section 73.202(b), RM-6245
Table of Allotments,
FM Broadcast Stations.
(Woodbury, Tennessee)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 25, 1988; Released: April 21, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of Bart Walker (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 285A to Woodbury, Tennessee, as that community's first local FM service.[1] Petitioner states that if the allotment is made he will apply for it.

2. Channel 285A can be allocated to Woodbury in compliance with the Commission's minimum spacing requirements with a site restriction of 5.4 kilometers (3.4 miles) northwest of the city.[2] The restriction is necessary in order to avoid a short spacing to Station WTCX, Channel 285A, Dayton, Tennessee.

3. In view of the fact that Woodbury could receive a first FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Woodbury, Tennessee | --- | 285A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 13, 1988,** and reply comments on or before **June 28, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Bart Walker
2519 Cabot Court
Murfreesboro, Tennessee 37130
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] An allotment to Woodbury on Channel 231A was originally requested in the Cookeville, Tennessee, proceeding. There, the Commission found the request to be procedurally defective. Subsequently, on reconsideration we have determined the availability of an alternative channel (285A), which may serve the public interest. *See Memorandum Opinion and Order,* in MM Docket No. 84-14, adopted January 27, 1988.

[2] The site coordinates are 35-51-09 and 86-07-19.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-165**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5978 |
| Table of Allotments, | RM-6198 |
| FM Broadcast Stations. | |
| (Sioux Center, Iowa and Sioux Falls, South Dakota) | |

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 25, 1988; Released: April 21, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making filed by: (1) Tri-State Broadcasters, Inc. (Tri-State), requesting the substitution of Channel 230C2 for Channel 232A at Sioux Center, Iowa, and the modification of its license for Station KVDB-FM to specify the higher powered channel (RM-5978); and (2) The Vaughn Broadcasting Group (Vaughn), requesting the substitution of Channel 230C2 for Channel 228A at Sioux Falls, South Dakota, and the modification of its license for Station KKRC(FM) to specify the higher powered channel. Co-channel Class C2 allotments are required to be separated by at least 190 kilometers while Sioux Center and Sioux Falls are located approximately 57 kilometers apart. Both Tri-State and Vaughn state an intention to apply for the Class C2 channel, if allocated to their community.

2. Tri-State, a wholly owned subsidiary of Northwestern College in Orange City, Iowa, states that it operates co-owned Stations KVDB-AM and FM as commercial operations serving the general public in Sioux Center and the surrounding area. It submits that its stations are the only commercial facilities in Sioux Center and Sioux County, serving 30,813 persons. Tri-State points out that Sioux Center is located in a rural area with low population density and that a wide coverage area FM station is needed in order to provide an adequate demographic base to support its operation as well as to provide timely news and information to the listening audience. It contends that a wide coverage area service is particularly needed during the winter months when it is necessary to disseminate emergency information concerning storms and school closings. Vaughn states that the substitution of channels at Sioux Falls would serve the public interest since it could enable it to provide a higher level of service to the residents of its community of license.

3. If Channel 230C2 is allocated to either Sioux Center or Sioux Falls, it appears that the respective stations would be able to greatly improve their coverage areas. Therefore, in order to make a determination as to which of the two proposals should be preferred, we request that the proponents further demonstrate why its community should receive the higher class allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In particular, both petitioners should submit a gain area showing indicating the population and square kilometers of the increased area to be served. *See e. g., Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987).

4. Channel 230C2 can be allocated to Sioux Center in compliance with the Commission's minimum distance separation requirements and can be used at Station KVDB-FM's current transmitter site. Channel 230C2 can be allocated to Sioux Falls in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.3 kilometers (8.3 miles) east to accommodate Vaughn's desired transmitter site.

5. As requested, we shall also propose to modify the licenses of Station KVDB-FM to specify Channel 230C2 at Sioux Center, Iowa, and Station KKRC(FM) to specify Channel 230C2 at Sioux Falls, South Dakota. Pursuant to the Commission's Rules, no other expressions of interest in use of the channel at either community shall be entertained. *See Modification of FM and TV Station Licenses*, 51 FR 20290, June 4, 1986, and Section 1.420(g) of the Commission's Rules.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| | **OPTION I** | |
| Sioux Center, Iowa | 232A | 230C2 |
| | **OPTION II** | |
| Sioux Falls, South Dakota | 223C, 228A, 243C, 247C1, 261A, 270C2, 284C | 223C, 230C2, 243C, 247C1, 261A, 270C2, 284C |

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 13, 1988,** and reply comments on or before **June 28, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel to Tri-State)

Clifford M. Harrington, Esq.
John Joseph McVeigh, Esq.
Fisher, Wayland, Cooper & Leader
1255-23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to Vaughn)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates for Sioux Center are: North Latitude 43-04-00; West Longitude 96-14-30. The coordinates for Sioux Falls are: North Latitude 43-30-11; West Longitude 96-34-38.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-166**

In the Matter of

Amendment of Section 73.202(b), RM-6251
Table of Allotments,
FM Broadcast Stations.
(Conklin, New York)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 25, 1988; Released: April 21, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Programmed Communications, Inc. (petitioner) requesting the allocation of Channel 227A to Conklin, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 227A can be allocated to Conklin in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) southwest to avoid a short-spacing to Station WNTQ, Channel 226B, Syracuse, New York, and to Station WKXZ, Channel 230B, Norwich, New York.[1] Canadian concurrence in the allotment is required since Conklin is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allocation of Channel 227A to Conklin, New York, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Conklin, New York | -- | 227A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 13, 1988,** and reply comments on or before **June 28, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy Kuhl
P.O. Box 738
Syracuse, New York 13214
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 42-00-31; West Longitude 75-51-58.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-244**

In re Applications of

| | |
|---|---|
| REBECCA RADIO OF MARCO<br>A Limited Partnership | File No. BPH-850711OB |
| EMERALD SEA BROADCASTING | File No. BPH-850712OF |
| AFFIRMATIVE BROADCASTING CORPORATION | File No. BPH-850712TX |
| SHOWCASE COMMUNICATIONS, INC. | File No. BPH-850712UB |
| MARCO MINORITY ASSOCIATES | File No. BPH-850712UA |
| SUSAN G. & WILLIAM R. GASTON | File No. BPH-850712UE |
| MARCO SKYWAVE, INC. | File No. BPH-850712UH |

For Construction Permit
for a New FM Station on
Channel 224A (92.7 MHz)
Marco, Florida

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 5, 1988; Released: April 21, 1988**

By the Review Board: MARINO (Chairman) and ESBENSEN; Board Member BLUMENTHAL absent.

1. Before us is a Petition for Extraordinary Relief filed April 4, 1988, by all the parties in the captioned proceeding. The parties ask us to stay the procedural dates (including the commencement of the comparative hearing proceeding, which is scheduled to commence within a matter of days) and, in essence, approve a settlement agreement in which a non-party to this proceeding would emerge as the permittee.

2. Specifically, the parties filed a Joint Request for Approval of Settlement Agreement and Petition for Leave to Amend, as well as a Motion to Suspend Procedural Dates with the presiding Administrative Law Judge (ALJ) on March 28, 1988. The parties represent that on March 30, 1988, they were advised by the ALJ's office that he did not intend to suspend the procedural dates. During a prehearing conference on April 1, 1988, the parties represent that the ALJ additionally declared that he would deny the proposed settlement agreement. Because witnesses are to be notified on April 8, 1988, and the hearing itself is scheduled for commencement on April 18, 1988, the parties filed their instant petition.

3. Under most circumstances we would deny the relief requested. The parties have not properly exhausted their administrative remedies before the ALJ and their request is premature. (*See* Section 1.301(b) of the Commission's Rules, 47 C.F.R. §1.301(b)). However, the hearing would now, in many respects, be virtually meaningless because there remain only seven applicants, who have all effectively declared that they are, in reality, no longer interested in litigating to establish their right to serve the needs and interests of the public in Marco, Florida. Indeed, they have agreed to forego that right for the following sums: In the case of Rebecca Radio of Marco, the price is $70,000. For Marco Minority Associates the consideration is $70,000; Marco Skywave, Inc., $35,000; Showcase Communications, Inc., $200,000; Emerald Sea Broadcasting, $250,000; William R. and Susan G. Gaston, $200,000; and, Affirmative Broadcasting Corporation, $230,000.

4. The proposed vehicle for effectuating this settlement is to have a non-party to this proceeding, Rowland Gulf Radio, Inc., (Rowland) provide the significant sums involved, substitute Rowland for Affirmative Broadcasting Corporation (utilizing Affirmative's engineering proposal at least for the time being; however, it is admitted that Rowland will "most likely . . . file for a change of [antenna] site . . . ."), and have the construction permit awarded to Rowland.

5. We will grant the parties' request for a temporary stay since it has become apparent that this multi-party litigation would be a meaningless waste of taxpayer's money, until such time that there is final resolution of the proposed settlement agreement. The criteria for issuance of a stay are set forth in *Virginia Petroleum Jobber's Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985). The parties argue that with respect to the "irreparable injury" criterion, "the expenditure of resources necessitated by a seven-party hearing will be substantial, and indeed may destroy the settlement itself, as it would upset the financial basis upon which the applicants were willing to enter into the present agreements" with the proposed permittee. With respect to the "harm to other parties" criterion, the parties observe that a "universal settlement is proposed and . . . there are no outside parties," or others, who would suffer as a consequence of the stay. Finally, concerning the "public interest" criterion, the parties submit that the Commission "attaches great importance to the effectuation of settlements to avoid delay and public expense of a hearing."

6. With respect to the argument that the parties are likely to prevail on the merits, the applicants represent that the Commission's Mass Media Bureau has concurred with the settlement proposal, contingent upon "publication of a newspaper notice assuming the settlement and identifying Rowland's ownership, so as to afford the public the same participatory rights provided by §73.3580 of the Commission's Rules with respect to a new applicant or entity." (Petition, para. 2). The parties further represent that the "public notice" is currently being published, with the final insertion scheduled for this date

(April 5, 1988). Thus, the parties argue that since the "underlying settlement bears the endorsement of the Mass Media Bureau . . . its ultimate approval must be deemed highly probable."

7. While it is obviously premature at this juncture for us to rule on the proposed settlement agreement (although the parties "petition the Board to reverse the Judge and suspend procedural dates pending consideration by the Board of the Joint Request"), we do note that if the settlement agreement, in its present form, was formally before us, we would, at best, certify the matter to the Commission, pursuant to Section 0.363(a) of the Commission's Rules, 47 C.F.R. §0.363(a), because we believe the settlement agreement herein presents a novel issue of law and/or policy. More specifically, the parties propose, as noted *supra*, that a non-party to this proceeding substitute itself for a party-applicant, pay off the remaining parties, and accede to the construction permit at issue herein. Obviously, neither this non-party's application, nor its qualifications to be a licensee, have been passed upon by the Commission. It is readily apparent that none of the principals of the corporate non-party has any interest or ownership in any of the current applicants, and none of the existing applicants, nor their principals, would have any interest in the resulting corporate permittee. Thus, while we do not necessarily agree that the parties have clearly demonstrated that they may likely prevail on the merits, we note that in *Hanover Radio, Inc.*, 91 FCC 2d 849, 851 (Rev. Bd. 1982) (reversal of ALJ's order refusing to stay procedural dates) we observed that the D.C. Circuit had reviewed its *Virginia Petroleum Jobber's Ass' n, supra*, criteria and indicated that if a "balance of the equities" test under three of these criteria (irreparable injury," "harm to other parties," and "public interest") militated towards a stay, one should likely be granted. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Therefore, while a close question, on balance we believe that under the specific circumstances of this particular proceeding, the requested temporary stay should issue to permit the parties to attempt a settlement. [1]

8. In sum, if the parties persist in their present posture, and if the Presiding Officer determines following submission of the proof of publication of the public notice, the comments of the Mass Media Bureau, and any additional comments of the parties (if appropriate), that he cannot grant the settlement as proposed, he may certify the matter directly to the Commission. Of course, the parties are free to try to reform their settlement agreement.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief filed April 4, 1988 by Rebecca Radio of Marco, Emerald Sea Broadcasting, Affirmative Broadcasting Corporation, Showcase Communications, Inc., Marco Minority Associates, Susan G. & William R. Gaston, and Marco Skywave, Inc., IS GRANTED to the extent outlined herein, and the procedural dates in this proceeding ARE STAYED as indicated.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**FOOTNOTE**

[1] Compare *Tequesta Television, Inc.*, 2 FCC Rcd 5688 (Rev. Bd. 1987). The paramount public interest will be served by our emergency action which may ultimately lead to a final termination of this proceeding and the earlier establishment of a new station in Marco, Florida. *Cf. Conference Report on Amendments to the Communications Act*, Pike and Fischer RR, Current Service 10:643, suggesting summary procedures to expeditiously resolve settlement agreements. The Board Chairman adheres to the separate views set out in *Dayton Telecasting, Inc.*, 96 FCC 2d 214, 219 (Rev. Bd. 1983), and *Marr Broadcasting Company, Inc.*, 2 FCC Rcd 3466, 3467 (Rev. Bd. 1987).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-147**

In the Matter of

Amendment of Section 73.202(b), RM-5952
Table of Allotments,
FM Broadcast Stations.
(Los Banos, California)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 10, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Ethnic Radio, Incorporated (petitioner), has filed a petition for rule making seeking the allotment of Channel 295A to Los Banos, California, as that community's second local FM broadcast service. Petitioner has failed to state that it will apply for the channel, as required by Commission policy, and should therefore correct the deficiency in its comments herein.

2. A staff engineering study has determined that Channel 295A can be allotted to Los Banos consistent with the minimum distance spacing requirements specified in Section 73.207(b) of the Commission's Rules.[1]

3. In view of the above, and the fact that the proposal could provide a second local FM broadcast service to Los Banos for the expression of diverse viewpoints and programming, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to that community, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Los Banos, California | 284B | 284B,295A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 12, 1988,** and reply comments on or before **June 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Michael H. Bader, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The required separations are met based on utilizing the city reference coordinates of Los Banos, as follows: 37-03-48; 120-50-54.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-573**

In re Applications of

SUE A. UNDERWOOD & BRENDA STROUD *et.al.* File No. BPH-860203NK

For Construction Permit for a New
FM Broadcast Station on Channel 264A
Charleston, South Carolina

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 8, 1988; Released: April 21, 1988**

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Review Board has before it an appeal filed March 1, 1988 by L.B.C., Inc. (LBC) from an *Order*, FCC 88M-514, released February 25, 1988 by Administrative Law Judge Joseph Chachkin (ALJ) dismissing both the application of Radio Charleston Partners (Radio Charleston) and a petition to intervene with respect to Radio Charleston's application filed by LBC. In essence, LBC claims that there are unresolved character issues pending against Radio Charleston's 50% owner, Vivian M. Bellairs, which the ALJ should have brought to the attention of the Office of the General Counsel when dismissing her application. LBC points out that Ms. Bellairs is a 50% owner of Sunshine Broadcasting, Inc., the comparative winner over LBC in FM proceeding MM Docket No. 83-1322, Fort Myers Villas, Florida, which is currently on appeal, *LBC v. FCC*, No. 88-1072 (D.C. Cir. docketed January 29, 1988), and it argues here that Sunshine should not be permitted to receive the license for the Fort Myers Villas facility until Ms. Bellairs is found to possess the requisite character qualifications. LBC urges the Board "to note" the existence of the unresolved character issues and bring this matter to the attention of the Commission.

2. Specifically, the unresolved issues adverted to by LBC stem back to a proceeding in which Ms. Bellairs daughter, Vivian Lynn Bellairs, was the applicant for a new FM station in Hardeeville, South Carolina, MM Docket No. 86-466. There, financial and financial certification issues were added against the Hardeeville applicant along with an issue to determine whether Vivian Lynn's father or uncle was an undisclosed principal in her application. Ms. Bellairs' daughter subsequently dismissed her application and the issues were never tried. Vivian Lynn is the other 50% principal in the Radio Charleston applicant.

3. We will dismiss the appeal because it is procedurally defective insofar as LBC does not seriously seek review of the ruling terminating its right to participate as a party to this proceeding (*i. e.*, the basis of authority for its Section 1.301(a) appeal), nor does it possess standing to challenge the ALJ's dismissal of Radio Charleston's application. Even if the appeal were not procedurally defective, however, it is apparent that the unusual, if not obscure, objective sought by this appeal (*i. e.*, alerting the Commission to the existence of the unresolved issues) has already been accomplished; that is, LBC itself filed on April 16, 1987 a Motion for Immediate Remand and to Reopen Record in the Sunshine Broadcasting, Inc. proceeding, based on the untried issues from the Hardeeville proceeding, while seeking reconsideration of the Commission's *Memorandum Opinion and Order*, [1] upholding the grant of Sunshine's application for the Fort Myers Villas, Florida facility. *See Sunshine Broadcasting, Inc.*, 2 FCC Rcd 7559, 7561 (1987). The only pertinent distinction between that motion in *Sunshine* and its argument in the appeal now before us is that LBC previously claimed that the Hardeeville issues could potentially impact on the character qualifications of Mr. Bellairs, the other owner in Sunshine, rather than Ms. Bellairs. The Commission reviewed the allegations and concluded that there was no basis for conducting further hearings on these matters. *Id.* The grounds for denial of LBC's requested relief are even stronger here because, unlike Mr. Bellairs, the Hardeeville issues did not even potentially concern Ms. Bellairs, and no untried issues against Ms. Bellairs remain from the instant proceeding.

4. ACCORDINGLY, IT IS ORDERED, That the appeal filed by L.B.C., Inc. on March 1, 1988 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**FOOTNOTE**

[1] *Sunshine Broadcasting*, Inc., 1 FCC Rcd 174 (1986).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-412**

In the Matter of

Amendment of Section 73.202(b), RM-5914
Table of Allotments,
FM Broadcast Stations.
(Litchfield, Minnesota)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 30, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6098 (1987), issued in response to a request filed by Litchfield Broadcasting Corporation (petitioner), licensee of Station KLFD-FM, Channel 237A, Litchfield, Minnesota, proposing the substitution of FM Channel 235C2 for Channel 237A and modification of the license accordingly. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were filed.

2. We believe the public interest would be served by the substitution of Channel 235C2 for Channel 237A at Litchfield, Minnesota, since it could provide the community with its first wide area coverage FM service. The channel can be allocated in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 12.8 kilometers (8.0 miles) northwest of the community.[1] The site restriction will prevent a conflict with a proposal to add Channel 235C2 to Albert Lea, Minnesota (MM Docket 87-306).

3. We have authorized in paragraph 5, a modification of petitioner's license for Station KLFD-FM, Litchfield, Minnesota, to specify operation on Channel 235C2 in accordance with Section 1.420(g) of the Commisssion's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Litchfield, Minnesota | 235C2 |

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KLFD-FM, Litchfield, Minnesota, IS MODIFIED TO SPECIFY operation on Channel 235C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for Channel 235C2 at Litchfield are 45-13-37 and 94-36-20.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-293**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5786 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Canaan, Vermont) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 29, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4785 (1987), issued at the request of Timothy D. Martz (petitioner), proposing the allocation of Channel 231A to Canaan, Vermont, as that community's first local FM service. Petitioner filed supporting comments reaffirming his intention to apply for the allocation.

2. The channel can be allocated to Canaan in compliance with the Commission's minimum distance separation requirements.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence has been obtained from the Canadian government.

3. We believe the public interest would be served by allocating Channel 231A to Canaan, Vermont, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Canaan, Vermont | 231A |

4. The window period for filing applications will open on **June 7, 1988,** and close on **July 7, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates are 44-59-46 and 71-32-20.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-179**

In the Matter of

Amendment of Section 73.606(b), RM-5651
Table of Allotments,
TV Broadcast Stations.
(Bryan and College Station, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 30, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of Central Texas Broadcasting Co., Ltd. (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 3420 (1987), proposing the allotment of UHF Television Channel 50- to either Bryan or College Station, Texas. We also proposed the reallotment of Channel *15 from Bryan to reflect its actual use at College Station. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to apply for Channel 50-. No other comments were received.

2. Initially, petitioner sought the allotment to Bryan-College Station on a hyphenated basis. Petitioners who seek hyphenated allotments, must make a very compelling showing, and the petitioner herein failed to make sufficiently strong showing to justify that such action be taken. The Commission determined that both communities (Bryan and College Station) were able to support a station. Therefore, we proposed alternatively to allot Channel 50-to either Bryan or College Station. Petitioner was requested to indicate which community it prefers.

3. In its comments, petitioner indicated a preference for the proposal to College Station. Petitioner restated its intention to use the channel as a satellite station for KXXV-TV, Channel 25, Waco, Texas.

4. In view of the aforementioned, we find that the public interest can be served by the allotment of Channel 50- to College Station, as that community's first commercial television service. The channel can be allotted to College Station in compliance with the mileage separation requirements of Sections 73.610 and 73.698 of the Commission's Rules.

5. It should be noted that the Commission recently imposed a freeze on television allotments, or applications therefor, in certain metropolitan areas,[1] College Station is affected as this proposal is within the prohibited co-channel distance to Houston, Texas, one of the specified communities.[2] Therefore, applications will not be accepted for Channel 50- at College Station until the freeze is lifted.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Bryan, Texas | 3, 28 |
| College Station, Texas | *15, 50- |

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] *See Order*, 52 FR 28346, July 29, 1987, freezing the filing of construction permit applications for vacant UHF television channels in affected metropolitan areas.

[2] *See* Section 73.610 of the Commission's Rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-183**

In the Matter of

Amendment of Section 73.202(b), RM-5636
Table of Allotments,
FM Broadcast Stations.
(Kotzebue, Alaska)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988** **Released: April 20, 1988**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 3482 (1987), proposing the allotment of Channel 280A to Kotzebue, Alaska, as that community's first local FM service, in response to a petition for rule making filed on behalf of Arctic Broadcasting Association (petitioner). Supporting comments were filed by petitioner reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 280A can be allotted to Kotzebue, Alaska, in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[1]

3. In consideration of the foregoing, we believe the public interest would be served by the instant proposal since it could provide a first local FM service to Kotzebue. Therefore, according to the authority set forth in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

| City | Channel No. |
|---|---|
| Kotzebue, Alaska | 280A |

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 280A at Kotzebue, Alaska, will open on **June 7, 1988,** and close on **July 7, 1988.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] This determination is based on use of the following reference coordinates of Kotzebue: 66-54-00; 162-35-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-380**

In the Matter of

Amendment of Section 73.202(b), RM-5732
Table of Allotments,
FM Broadcast Stations.
(Thief River Falls, Minnesota)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 30, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5866 (1987), proposing the allocation of FM Channel 257A to Thief River Falls, Minnesota, as that community's third FM service.[1] The *Notice* was issued in response to a petition filed by Northern Minnesota Associates (petitioner). Comments were filed by the petitioner restating its interest in the allocation. No other comments were received.

2. Channel 257A can be allocated to Thief River Falls, Minnesota, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[2] Since Thief River Falls is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that Channel 257A can be allocated to Thief River Falls to provide the community with its third FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Thief River Falls, Minnesota | 257A, 262C1, 274C1 |

4. The window period for filing applications will open on **June 7, 1988,** and close on **July 7, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Channel 257A was removed from the Table of Allotments in MM Docket 85-370, 51 FR 27552, August 1, 1986.

[2] The coordinates for Channel 257A are 48-07-06 and 96-10-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-308**

In the Matter of

Amendment of Section 73.202(b), RM-5828
Table of Allotments,
FM Broadcast Stations.
(Socorro, New Mexico)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 28, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of Haynes Communications Co. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5112 (1987), proposing the substitution of Channel 225C1 for Channel 224A at Socorro, New Mexico, and the modification of its license for Station KHBN-FM to specify the higher powered channel. Petitioner filed comments supporting the upgrading of Station KHBN-FM.[1] No other comments were received.

2. Petitioner, in its comments, reiterates that it wants to upgrade Station KHBN-FM from its Class A status in order to provide improved service to Socorro by eliminating the signal shadowing which it is experiencing with its present facilities. However, it now requests that Channel 284C be allocated in lieu of its originally proposed Channel 225C1, and that its license for Station KHBN-FM be modified accordingly. Petitioner claims that it has been unable to find a suitable transmitter site for Channel 225C1 but that it has found two possible sites for Channel 284C. Petitioner states that it will apply for the channel, if allocated. Recognizing that it now seeks the modification of its license to a non-adjacent channel, petitioner proposes the allotment of Channel 225C as an additional equivalent channel for use by other interested parties. *See* Section 1.420(g) of the Commission's Rules.

3. The Commission's decision in *Modification of FM and TV Station Licenses*, 98 F.C.C. 2d 916 (1984), amended Section 1.420 of the Commission's Rules to specify that a station's license could be modified to specify a non-adjacent higher class channel where an additional equivalent channel was available for use by other interested parties. We recognize that no parties were afforded an opportunity to express such an interest in this proceeding since the originally proposal was for an adjacent channel upgrade. However, we have confirmed that there is at least one additional Class C channel which can be allocated to Socorro should any other parties be interested in providing a second such service to the community at a later date. *See Ketchum and Sun Valley, Idaho*, 2 FCC Rcd 2297 (1987) and *Midland and Alpena, Michigan*, 2 FCC Rcd 7268 (1967). Therefore, we believe the public interest would be served by allocating Channel 284C to Socorro since it could provide the community with its first wide coverage area FM service and enable the provision of improved service by Station KHBN-FM.

4. Channel 284C can be allocated to Socorro in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.5 kilometers (17.7 miles) northwest to avoid a short-spacing to unused and unapplied for Channel 284C2 at Roswell, New Mexico.[2] Mexican concurrence in the allocation of Channel 284C at Socorro has been obtained since the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Socorro, New Mexico | 284C |

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] H&HSB Corporation, proposed assignee of Station KHBN-FM, filed an amendment to petitioner's comments stating that the parties had consummated the assignment of license and stating its support for the channel substitution.

[2] The coordinates for this allotment are: North Latitude 34-09-54, West Longitude 107-10-45.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-277**

In the Matter of

Amendment of Section 73.202(b), RM-5773
Table of Allotments,
FM Broadcast Stations.
(St. Joseph, Tennessee)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 25, 1988; Released: April 20, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Raymon and Brenda Chandler (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 4674 (1987), proposing the allocation of Channel 268A to St. Joseph, Tennessee, as that community's first local FM service. Comments were filed by the petitioner reiterating an interest in the allotment.

2. The channel can be allotted to St. Joseph in compliance with the Commission's minimum spacing separation requirements with a site restriction of 9.2 kilometers (5.7 miles) northwest of the community. The restriction is necessary to avoid a short spacing to Station WFMH-FM, Channel 266, Cullman, Alabama.[1]

3. In view of the aforementioned, we believe the public interest would be served by the allocation of Channel 268A to St. Joseph, Tennessee, as that community's first FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 6, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| St. Joseph, Tennessee | 268A |

4. The window period for filing applications will open on **June 7, 1988,** and close on **July 7, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The restricted site coordinates are 35-06-36 and 87-33-13.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-167**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6125 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Staunton, Virginia) | |

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 30, 1988; Released: April 21, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Ogden Broadcasting of Virginia, Inc. (petitioner), seeking the substitution of Channel 232B1 for Channel 232A at Staunton, Virginia. Petitioner also requested the modification of its construction permit for Channel 232A to specify operation on the higher class channel.

2. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.4 kilometers (8.3 miles) southwest of the city.[1] This restriction is necessary in order to protect Station WQZK-FM, Channel 231B, Keyser, West Virginia and Station WQRA(FM), Channel 232A, Warrenton, Virginia. In addition, this proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia. Therefore, it must conform with the notification requirements of Section 73.1030(c)(1)-(5) of the Rules.

3. As requested, we shall propose to modify the construction permit for Channel 232A to specify operation on the higher class co-channel, Channel 232B1. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Staunton.

4. In view of the fact that Staunton, Virginia, could receive its second wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Staunton, Virginia | 228A, 232A, 259B | 228A, 232B1, 259B |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 13, 1988,** and reply comments on or before **June 28, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Philip L. Malet, Esquire
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates of the petitioner's proposed site are 38-04-00 and 70-11-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| RKO GENERAL, INC. (KRTH)<br>Los Angeles, California<br><br>For Renewal of License | **MM DOCKET NO. 84-1184**<br>File No. BR-22 |
| FUTURE BROADCASTING, INC.<br>Los Angeles, California | **MM DOCKET NO. 84-1186**<br>File No. BP-800924AC |
| VALLEY RADIO 670<br>Los Angeles, California | **MM DOCKET NO. 84-1187**<br>File No. BP-830506AD |
| SOUTH JERSEY RADIO, INC.<br>Hawthorne, California | **MM DOCKET NO. 84-1188**<br>File No. BP-830511AE |
| COZZIN COMMUNICATIONS CORPORATION<br>Beverly Hills, California<br><br>For Construction Permit for a New AM Station | **MM DOCKET NO. 84-1190**<br>File No. BP-830512AY |
| RKO GENERAL, INC. (KRTH-FM)<br>Los Angeles, California<br><br>For Renewal of License | **MM DOCKET NO. 84-1195**<br>File No. BRH-25 |
| MARISOL BROADCASTING, LTD., A LIMITED PARTNERSHIP<br>Los Angeles, California | **MM DOCKET NO. 84-1196**<br>File No. BPH-830512CZ |
| RADIO RADIO, INC.<br>Los Angeles, California | **MM DOCKET NO. 84-1198**<br>File No. BPH-830512BE |
| SOUTH JERSEY RADIO, INC.<br>Los Angeles, California | **MM DOCKET NO. 84-1199**<br>File No. BPH-830512BZ |
| COZZIN COMMUNICATIONS CORP.<br>Los Angeles, California | **MM DOCKET NO. 84-1201**<br>File No. BPH-830512BC |
| VALLEY RADIO 670<br>Los Angeles, California | **MM DOCKET NO. 84-1203**<br>File No. BPH-830506AG |
| FUTURE BROADCASTING, INC.<br>Los Angeles, California<br><br>For Construction Permit for a New FM Station | **MM DOCKET NO. 84-1207**<br>File No. BPH-800924AA |

**Appearances**

John *J. Duffy*, *Donald M. Itzkoff* and *Daniel Marcus* on behalf of RKO General, Inc., *Robert Lewis Thompson* and *Robert F. Aldrich* on behalf of Future Broadcasting, Inc.; *Jerrold Miller* on behalf of Valley Radio 670; *Alfred C. Cordon, Jr.*, *Dennis J. Kelly* and *Marie R. Kaplan* on behalf of South Jersey Radio, Inc.; *Ben C. Fisher* and *Janet M. Evans* on behalf of Cozzin Communications Corp.; *Douglas G. Thompson, Jr.*, *Sharon Powers Sivertsen* and *Ann P. Morton* on behalf of Marisol Broadcasting, Ltd.; *Howard M. Liberman*, *Karl A. Kensinger* and *Anna D. Socrates* on behalf of Radio Radio, Inc.; and *Larry A. Miller* and *Linda R. Figueroa* for the Mass Media Bureau, Federal Communications Commission.

**PARTIAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

**Issued: March 29, 1988; Released: April 20, 1988**

**PRELIMINARY STATEMENT**

***Background***

1. This is a partial initial decision in a consolidated case conducted under Section 5 of the Administrative Procedure Act (APA) [5 U.S.C. §554 *et seq.* ] to determine which of four applicants for Standard Broadcast Station KRTH(AM): Future Broadcasting, Inc. (Future), Valley Radio 670 (Valley), South Jersey Radio, Inc. (South Jersey) and Cozzin Communications, Inc. (Cozzin); and which of six applicants for FM Broadcast Station KRTH-FM: Marisol Broadcasting, Ltd., (Marisol), Radio Radio, Inc. (Radio), South Jersey, Cozzin, Valley and Radio, should oppose RKO General, Inc. (RKO) in a final comparative hearing should RKO be found qualified by the Commission to continue to operate these broadcast facilities in Los Angeles, California.

2. This proceeding was commenced by the Commission pursuant to *Memorandum Opinion and Order*, FCC 84-544, released December 20, 1984, and published at 47 Fed. Reg. 50,449 (December 28, 1984) (hereafter the "Designation Order"). The Designation Order contemplated that all contenders for the AM and FM construction permits, including the license-holder RKO, would compete in a single consolidated hearing. The Commission subsequently modified the Designation Order and directed that comparative hearings initially be conducted on all applicants other than RKO. *See RKO General, Inc.* (WYFR-FM), *et al.*, FCC 85-80, 100 F.C.C. 2d 462, 467-68

(1985). The winner here, as well as the winners in related proceedings in different markets, will meet RKO, or its successor, in a final comparative round. *See e. g., RKO General, Inc.* (WHBQ-TV), FCC 87D-23, 2 F.C.C. Rcd 4111 (1987) (awarding TV construction permit to River City Communications Corporation in Memphis). It is noted that RKO has been initially determined to be unqualified to compete as a licensee in this proceeding, a determination which is now on appeal to the Commission. *See RKO General, Inc.* (KHJ-TV), (Judge Kuhlmann) *Partial Supplemental Initial Decision*, 2 F.C.C. Rcd 4807 (1987).

3. Initial prehearing conferences were held in this case on February 20 and April 30, 1985. Assignment of the case to this Presiding Judge was made following the former Judge's retirement in January 1986. *See Order*, FCC 86M-004, released January 6, 1986, and *Order* FCC 86M-480, released February 6, 1986. Additional prehearing conferences were held on March 6, May 2, June 13, June 26, July 14 and July 22 in 1986 and on April 10, 1987. All evidentiary hearings were conducted before this Presiding Judge on May 19 - June 4, 1986; June 9 -June 12, 1986 (Phase I); July 22 - July 24, 1986 (Phase II) and April 21 - April 23, 1987 (Phase III). The record was closed on the last day of the Phase III hearings, April 23, 1987.

4. Between evidentiary hearings in Phase II and Phase III, the Commission ordered the RKO proceedings (except KHJ-TV) held in abeyance pending settlement negotiations. *See RKO General, Inc.* (KHJ-TV), FCC 86-383, 60 Radio Reg. 2d (P&F) 1964 (September 12, 1986). Several months later this proceeding was reactivated. *See RKO General, Inc.* (KHJ-TV), 2 F.C.C. Rcd 1626 (March 16, 1987). A briefing schedule was set after concluding the April 1987 Phase III hearings and Proposed Findings and Conclusions of Law were required to be filed on June 15, 1987, with Reply Findings of Fact and Conclusions of law due to be filed on July 10, 1987. *See Order* FCC 87M-811, released April 13, 1987. The parties have complied with that schedule.

## DISMISSED PARTIES

5. Exclusive of RKO, there were eighteen party applicants to this proceeding when it was commenced on December 20, 1984. Twelve of those initial eighteen were dismissed in the course of pretrial and trial developments. These are: Spanish Radio for Los Angeles, Inc., *Order*, FCC 85M-709, released February 14, 1985; Sam S. Choi d/b/a Los Angeles Metro Broadcasters, *Order*, FCC 85M-831, released February 22, 1985; Stephen E. Powell, *Order*, FCC 85M-1095, released March 16, 1985; Douglas Reed Mathis, *Order*, FCC 85M-1094, released March 15, 1985; Los Angeles Women Broadcasting Co. *Order*, FCC 85M-1406, released April 2, 1985; Dick Clark Broadcasting, Inc., *Order* FCC 85M-1455, released April 5, 1985; First City Communications, Inc. *Order*, FCC 85M-1533, released April 10, 1985; Belvedere Broadcasting Limited Partnership and Hobart Broadcasting Limited Partnership, *Order*, FCC 85M-1991, released May 7, 1985; Women in Broadcasting Corporation, *Order*, FCC 85M-2685, released July 3, 1985; Mandeville Communications Company, *Order*, FCC 85M-3367, released August 29, 1985; and Los Angeles Broadcasting Company, *Order*, FCC 86M-2423, released July 31, 1986.

## LITIGATED ISSUES

6. Issues were tried which were initially set in the Designation Order and additional issues were tried which were added by the Presiding Judge.[1] These are the following:

*Designated Issues*

(1) To determine with respect to the AM applicants: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(2) To determine with respect to the AM applicants, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine with respect to the FM applicants which of the proposals would, on a comparative basis, best serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

*Added Issues*

By *Memorandum Opinion and Order*, FCC 86M-1189, released April 7, 1986, the Presiding Judge added the following issues against Radio Radio, Inc.:

(5) To determine whether Radio Radio, Inc. misrepresented or lacked candor in failing to answer the financial certification question on Form 301 when it filed its application, and if so, the effect such an omission has on its basic qualifications.

(6) To determine whether Radio Radio, Inc. falsely certified as to its financial qualifications, and if so, the effect such certification has on its basic qualifications.

By *Memorandum Opinion and Order*, FCC 86M-2295, released July 17, 1986, the Presiding Judge added the following issues against Valley Radio 670:

(7) To determine whether Valley Radio 670 is financially qualified to construct and operate its proposed station.

(8) To determine whether Valley Radio 670 has misrepresented or exhibited a lack of candor to the Commission in certifying that it is financially qualified to construct and operate its proposed station.

(9) To determine in light of the evidence adduced under these added issues whether Valley Radio 670 possesses the basic qualifications to be a Commission licensee.[2]

## PROOF AND PROCEDURE

7. The burden of proceeding on issues five and six were assigned to Future Broadcasting while the burden of proof was assigned to Radio. The burden of proceeding on issues seven, eight and nine were assigned to Marisol and the burden of proof was assigned to Valley.

8. During the course of this hearing, counsel for all parties were given full opportunity to be heard and to cross-examine the witnesses in accordance with the APA [5 U.S.C. 556(d)]. Proposed findings not adopted in the form or substance proposed are rejected as either not supported by reliable, probative and substantial evidence or as involving immaterial or irrelevant matters based on the record considered as a whole. *See* APA §7(c) [5 U.S.C. §556(d)]. In addition to the issues set forth above, there were related issues added against Cozzin Communications in the RKO Boston (WRKO) proceeding, MM Docket No. 84-1057, and resolved against Cozzin by that Presiding Judge. *See Contingent Initial Decision*, FCC 86D-47 (Judge Miller), released July 23, 1986, at 6-13; 67-68. The findings and conclusions as to Cozzin in the WRKO Boston proceeding are controlling here. *See RKO General, Inc. (WRKO)*, FCC 85M-890, released March 1, 1985. *See also RKO General, Inc. (WHBQ - TV), Order* FCC 85M-320, released January 22, 1985, (consolidating Cozzin qualification issues here with the RKO Boston case) and *compare United Broadcasting Co.*, 49 Radio Reg. 2d (P&F) 597, 598 (1981) (party is collaterally estopped from relitigating factual findings and legal conclusions made in Commission orders).

9. This partial initial decision is issued in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions as well as reasons or basis therefor). The following abbreviations are used in citing to the record:

| Exhibit | Acronym Party |
|---|---|
| RKO Exh. | RKO General, Inc. |
| Future Exh. | Future Broadcasting, Inc. |
| Valley Exh. | Valley Radio 670 |
| SJR Exh. | South Jersey Radio, Inc. |
| Cozzin Exh. | Cozzin CommunicationsCorporation |
| Marisol Exh. | Marisol Broadcasting, Ltd. |
| Radio Exh. | Radio Radio, Inc. |

Evidence which supports findings and conclusions under the 307(b) issue is contained in an exhibit introduced and received as "SJR AM Stipulation" and "Cozzin AM Stipulation" and further evidence received as a joint exhibit entitled "Los Angeles Applicants' Joint 307(b) Exhibit" and cited herein as "LAJA/AM Exh." Testimony is cited by the transcript page number, e.g., Tr. 0001. References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

## FINDINGS OF FACT

10. Since the applications of all of the applicants are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

*The Community Needs Issue*

11. Section 307(b) of the Act [47 U.S.C. §307(b)] requires the Commission to "make such distribution of licenses - - - among the several states and communities as to provide a fair, efficient and equitable distribution of radio service - - -." Where it is determined that one community has a greater need for service to a decisionally significant degree, only applicants specifying that community are given further consideration. *F. C. C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 361-62 (1955). Since an applicant which receives a dispositive preference under §307(b) will win without the need to go through the comparative process, this issue will be addressed first.

12. The four AM challengers and RKO are uniform in proposing services for Los Angeles, California. Therefore, the proposed daytime 5.0 mV/m, 2.0 mV/m and 0.5 mV/m contours for all AM applicants are the same as the existing contours of KRTH(AM). However, although RKO, Future and Valley propose Los Angeles as the community of license for the AM facility, South Jersey would operate the AM station from Hawthorne and Cozzin would operate it from Beverly Hills, both of which are California communities. (LAJA Exh. B) It is common to all three locations within its 0.5 mV/m daytime contour, that the station's signal reaches almost 10 million people and covers nearly 10 thousand square miles and within its 5.0 mV/m daytime contour the signal reaches 8.6 million people and covers nearly 2 thousand square miles. (*Id.*)

*The City of Hawthorne*

13. Hawthorne was founded in 1905. It was incorporated as a city in 1922 and covers an area of 5.67 square miles. As of 1980, Hawthorne had a population of 56,447. It has a city council/city manager form of government with four elected council members and one elected mayor. Hawthorne voters also elect their own city clerk and city treasurer The city is organized into thirteen departments (police, fire, etc). (SJR Exh. 4, pp 1-7.)

14. Approximately one-third of Hawthorne's land area is zoned for industry. There are 215 industrial firms, five banks, five savings and loan associations and two credit unions located in Hawthorne. Hawthorne has a municipal airport that is in the process of being upgraded. Hawthorne has redevelopment projects including a shopping plaza and several road projects. (SJR Exh. 4, pp. 7-11.)

15. Hawthorne has five neighborhood parks and a 13.5 acre City Park. A variety of recreational activities are provided to its residents. El Camino College, with 27,000 students, is located in Hawthorne and provides cultural activities. The Hawthorne Memorial Center has a 900 seat auditorium. Hawthorne is part of the Centimela Valley Union High School District which includes five high schools. Hawthorne's elementary schools are part of the Hawthorne School District and Wiseburn School District which have nine elementary schools. There are also four parochial schools in Hawthorne. (SJR Exh. 4, pp. 12-17.)

16. Hawthorne has a main library with two branches. There are two full-service hospitals located in Hawthorne. There are also three medical clinics, a chiropractic clinic and a nursing home. There are 26 places of worship. There are 70 clubs and organizations. There is one weekly newspaper and one quarterly newspaper published. Hawthorne has a branch of the United States Postal Service. There are no broadcast stations licensed to Hawthorne. (SJR Exh. 4, pp. 17-21.)

17. South Jersey recognizes the likelihood that the majority of the proposed station's advertising revenues will be derived from areas other than Hawthorne and that the majority of advertisers will desire to reach an audience throughout the metropolitan area. In reaching a final decision on the format to the station, one of South Jersey's major goals will be to select a music format that is designed to attract the largest number of listeners throughout the station's service area. (South Jersey AM Stipulation at 2-5.)

*The City of Beverly Hills*

18. Beverly Hills was incorporated as a city in 1914. It covers an area of 5.69 miles and it is bounded by the city of Los Angeles on the north, south and west sides, and by West Hollywood on the east side. Like Hawthorne, Beverly Hills utilizes the city council/city manager form of government but only the council members are elected. They, in turn, select a mayor from among the council members who serves for one year. The council also appoints a city manager, a city attorney and a city clerk. But the city treasurer is elected directly by the citizens of Beverly Hills. Council members also appoint persons to serve on various commissions (planning, traffic, architecture, civil service, and solicitations). The city is organized into eleven operational departments (police, fire, etc.). (Cozzin Exh. 1, pp. 1-3.)

19. Beverly Hills has 42 banks and 23 savings and loan associations. The city has six public parks, five playgrounds, six mini-parks and four public tennis courts. A new civic center is being built to house city offices. A community cultural facility with a 550-seat auditorium will also be part of the civic center. The city has several local theaters and numerous dining places. (Cozzin Exh. 1, pp. 3-6.)

20. The Beverly Hills Unified School District has four elementary schools and one high school with a total enrollment of over 5,600 students. The school district also has two adult education schools with over 4,400 students. The Beverly Hills Public Library has 85,000 volumes and it will be expanded. (Cozzin Exh. 1, pp. 6-7.)

21. In 1984, Beverly Hills issued 12,690 business licenses. A wide variety of goods and services are available in the City. There are eight places of worship located in Beverly Hills. There are 40 clubs and organizations located in Beverly Hills. Beverly Hills has three weekly newspapers but no radio or television stations are licensed to Beverly Hills. (Cozzin Exh. 1, pp. 8-11.)

22. Beverly Hills has access to every major freeway in the greater Los Angeles area. Beverly Hills is bordered by the Hollywood Freeway to the north, the Pasadena Freeway to the east, the Santa Monica Freeway to the south and the San Diego Freeway to the west. Most telephone calls within the greater Los Angeles area are not long distance. (Cozzin Exh. 1, pp. 11-12.)

23. Cozzin recognizes that while Beverly Hills has a population of only 32,000, the potential listener service area includes over 8 million people. In reaching a final decision on the format of the station, one of Cozzin's goals would be to select a format that is designed to attract the largest number of listeners throughout the station's service area. Cozzin recognizes that most of the station's advertising revenues will be derived from areas other than Beverly Hills and that most advertisers will want to reach an audience throughout the metropolitan area. (Joint Stipulation at 3- 4.)

*The City of Los Angeles*

24. Los Angeles was established as a city by the Spanish colonial government in 1781 (LAJA/AM Exh., p. 5.) In 1910, the U.S. Census Bureau classified cities into metropolitan areas for the first time. Los Angeles ranked fourteenth out of twenty five cities, with a population of 879,008 in the year 1910. (LAJA/AM Exh., p. 7.) Los Angeles had a 1980 census population of 2,966,763. It is an oddly shaped city that encloses many smaller cities on three or more sides. (LAJA/AM Exh., pp. 23-24.) Los Angeles provides most of its own services through fifteen operating departments: Aging, Airports, Animal Regulation, Building and Safety, Community Development, Fire, General Services, Harbor, Library, Planning, Police, Public Works, Recreation and Parks, Transportation, and Water and Power. There are also nine commissions and administrative offices (LAJA/AM Exh., p. 25.) There are seven daily newspapers published in the City of Los Angeles. (LAJA/AM Exh., p. 41.) Los Angeles has at least twenty eight radio stations licensed to it not including the stations sought here, KRTH(AM) and KRTH-FM (South Jersey Exh. 6, pp. 1-2).

25. Since 1910, Los Angeles has been defined by the U.S. Census Bureau as a metropolitan area. Between 1950 and 1980, Los Angeles County was designated a Standard Metropolitan Statistical Area (SMSA). Since 1980 the largest metropolitan unit is the Consolidated Metropolitan Statistical Area (CMSA) which is made up of several Primary Metropolitan Statistical Areas (PMSA). The Department of Commerce defines CMSA as follows:

> The general concept of a CMSA is one of a large population nucleus together with adjacent communities which have a high degree of social and economic integration with that nucleus.

The Los Angeles - Anaheim - Riverside CMSA roughly corresponds to the counties of Los Angeles, Orange, Ventura, Riverside and San Bernardino. It is made up of four PMSA's.

| PMSA | County |
|---|---|
| Los Angeles - Long Beach | Los Angeles |
| Anaheim - Santa Ana | Orange |
| Oxnard - Ventura | Ventura |
| Riverside- San Bernardino | Riverside, San Bernardino |

Prior to 1980 the four PMSA's were separate SMSA's (LAJA/AM Exh., pp. 18-19.)

26. The Los Angeles Metropolitan Region encompasses a 60-mile radius around the City of Los Angeles. This five county region is a complex web of separate political entities with overlapping jurisdictions. The City of Los Angeles is eight times larger than the second largest city (Long Beach) and dominates the region. The five counties in the region each has its own level of government. For instance, Los Angeles County, wherein Los Angeles, Beverly Hills and Hawthorne are all located, provides 159 separate services and has 60 departments. In addition, Los Angeles County has 1582 separate service agreements to provide services to municipalities within the county on a

contract basis. There are also special districts that transcend local government boundaries to provide a single service (e.g., flood control). In Los Angeles County there are 476 special districts, 151 in Orange County, 187 in Riverside County, 166 in San Bernardino County and 105 in Ventura County (LAJA/AM Exh., pp. 20-23.)

27. The Los Angeles - Anaheim - Riverside CMSA has 146 cities with 80 of those cities located in Los Angeles County. Many of those cities have been carved out of the City or County by developers. There are several governmental bodies that administer services on a regional basis covering the five counties (Metropolitan Water District, Southern California Association of Governments, Southern California Rapid Transit District, South Coast Air Quality Management District, Los Angeles County Transportation Commission, and Los Angeles City Department of Airports). (LAJA/AM Exh., pp. 25-28.) The Los Angeles - Anaheim - Riverside CMSA had a 1980 census population of 11,498,000 second largest in the United States. The populations of the five counties are: Los Angeles - 7,477,657, Orange - 1,931,570, San Bernardino - 893,157, Riverside - 663,923, and Ventura - 529,899. (LAJA/AM Exh., p. 29.)

28. The Los Angeles Metropolitan Region has recognized industrial concentration and it is a leading trade center. (LAJA/AM Exh., pp. 32-37.) The Los Angeles Metropolitan Region is linked together by public transportation and an extensive freeway system. People travel in the region over long distances on a daily basis for work, shopping, recreation or entertainment. There are 34 freeways in Los Angeles, Orange and Ventura counties covering approximately 710 miles of roadway. Approximately 97% of all work trips generated by residents of Los Angeles County end within the county. Approximately 25% of all work trips from Ventura County, 20% of all work trips from Orange County, 17% of all work trips from San Bernardino County (the majority between 40-50 miles from downtown Los Angeles), and 5% of all work trips from Riverside County (the majority over 50 miles from downtown Los Angeles) terminate in Los Angeles County. (LAJA/AM Exh., pp. 37- 38.)

## THE STANDARD COMPARATIVE ISSUE AND THE DESIGNATED QUALIFYING ISSUES

### *Auxiliary Power*

29. All applicants, with the exception of Marisol, propose to install at their studio and transmitter locations provisions for auxiliary power resources so that in the event of an outage the proposed facility will remain on the air. (*See* Radio Exh. 3; Future Exh. 18; Valley Exh. 1; SJR Exh. 3; Cozzin Exh. 4.)

### *Diversification*

#### *Future Broadcasting, Inc.*

30. Future has no interest in any medium of mass communications. Each shareholder of Future who has a connection with or an ownership interest in such a medium has made a timely divestiture pledge and Future has pledged that if it is the winner on either its AM or its FM application, it will dismiss the remaining one. (Future Exh. 17.)

#### *Valley Radio 670*

31. Valley is the current licensee of station KWNK(AM) in Simi Valley, California. It has committed to divest its interest in that station if either or both of the Los Angeles applications are granted. (Valley Exh. 1, p. 5.)

32. Mr. Cabranes is general manager of station KWNK(AM). Upon grant of one or both of the Los Angeles radio applications, he will "sever all connection with KWNK." (Valley Exh. 2, p. 6.) Mr. Cabranes has no other involvement in any medium of mass communications. (Valley Exh. 1, p. 5.)

33. Mr. Landegger is the sole owner of Henland, Inc. which is a printing and publishing business that prints newspaper inserts and detached cards for third-class mail. (Valley Exh. 1, p. 5.) Henland, Inc. also publishes *The Valley Shopper*, an advertising paper which is distributed without charge in different zones from Camarillo to Goleta, California. (Valley Exh. 1, p. 5.) It also publishes *USA Direct Mail*, a publication containing advertising material mailed to residents, and *USA Business to Business*, an advertising pamphlet mailed to businesses. (Valley Exh. 1, p. 5; Tr. 1708.) None of these publications contain editorials. (Valley Exh. 1, 5; Tr. 1709.)

#### *South Jersey Radio, Inc.*

34. The findings on South Jersey's diversification are based on the same findings made by this Presiding Judge in *RKO General, Inc.*, et al. (WHBQ- TV, Memphis), 2 F.C.C. Rcd 4111, 4114 (1987) which are repeated in paragraphs 35 to 38 below.

35. South Jersey has several mass media interests which relate to diversification. It is the licensee of stations WOND(AM) in Pleasantville, New Jersey, station WMGM(FM) in Atlantic City, New Jersey (population est. 194,000) and station WMGM-TV in Wildwood, New Jersey (population est. 4,900).

36. South Jersey also owns and publishes *The Sentinel - Ledger*, the only weekly newspaper (twice-weekly in the summer) which is published in Ocean City - Somers Point, New Jersey, a community which has no daily newspaper.

37. South Jersey's principals also have mass media interests. Mr. Green and Mr. Simmons each owns 50% of WENY, Inc. which is licensee of three stations in Elmira, New York (population @35,000): WENY(AM), WLEZ(FM) and WENY-TV, WENY, Inc. It also is licensee of TV translator station WGAR in Hornell, New York and radio stations WKAL(AM) and WTOC(FM) in Rome, New York and it is permittee of TV translator station WO7BJ in Ithaca, New York (population @28,700).

38. Messrs. Green, Simmons and Jackler each own 14.285% (combined total of 42.855%) of Gold East Broadcasters, Inc., a company which had a contingent right to acquire a construction permit for a new television station in Brunswick, Georgia in the event the grantor failed to complete construction by June 30, 1986. South Jersey represents that the Commission cancelled the construction permit on December 11, 1985.

39. South Jersey has a right of first refusal for any attempted sale of Channel 24 TV's facility in Charleston, South Carolina or in any attempted sale of a controlling interest in its permittee. Mr. Green has a consulting con-

tract with the permittee of Channel 24 which extends for a period of five years following the commencement of program testing.

40. South Jersey was the winner in the RKO Fort Lauderdale proceeding and will remain to litigate against RKO or its successor in any final comparative round. *See RKO General, Inc., et al.* (WAXY-FM), FCC 87D-20 2 F.C.C. Rcd 3348 (1987).

41. On November 27, 1985, the Commission granted South Jersey's application for a voluntary transfer of control of WMGM-TV to its principals, Messrs. Green and Simmons, and on December 30, 1985, the license of WMGM-TV was assigned from South Jersey Broadcasting Corporation to South Jersey Radio, Inc. *Id.* at Para 54.

*Cozzin Communications Corporation*

42. Cozzin is the permittee of W69AM, a low-power TV station at Alachua, Florida. (Cozzin Exh. 4.)

43. Mr. Cosby, the majority equity owner of Cozzin, has a royalty interest in the "Bill Cosby Show" which is broadcast in the Los Angeles/Beverly Hills area over TV Station KNBC under a network exhibition contract between the show's owner, Carsee-Warner Co., and NBC. Mr. Cosby has a "significant say" in the program's content but he has no control over its distribution. Mr. Cosby also has a 50% ownership interest in the "Fat Albert Show" which appears in the Los Angeles/Beverly Hills area over TV Station KTTV. (Cozzin's PFC at para. 7, pp. 6-7.)

*Marisol Broadcasting Ltd.*

44. Ms. Sandra Serrano Sewell, a general and limited partner of Marisol, is president of the board of directors of *Caminos* magazine, a bilingual non-profit publication. *Caminos* is published in Los Angeles, has a national subscription circulation of approximately 40,000, and a "pass along" circulation within the Los Angeles Hispanic community that is estimated at five times the national subscription. Ms. Sewell exercises control over its editorial content and has fiscal and legal responsibilities. The editor and staff reports to the board on its activities. Ms. Sewell testified that her term as president expired in June and that she may not seek re-election to that office. She also testified that she could remain on an honorary board. (Marisol Exh. 2; Tr. 740-41, 748, 840.)

45. None of Marisol's other general and/or limited partners have any ownership interests in any broadcast station, cable television system, news- paper, magazine or any other medium of mass communications. (Marisol Exh. 2.)

*Radio Radio, Inc.*

46. Neither Radio nor its shareholders have any interest in any media of mass communications. (Radio Exh. 1.)

## DESCRIPTION OF THE APPLICANTS AND THEIR PROPOSED INTEGRATION INTO MANAGEMENT

*Future Broadcasting, Inc.*

*The Applicant*

47. Future is a California corporation which first filed applications for the Los Angeles stations in September, 1980. At that time, Future had 24 shareholders, each of which had voting shares. (RKO Cross Exh. 15.) Each shareholder was also a member of the board of directors. (Tr. 2712.) Future issued 10,000 shares of stock, which consisted of 1,000 shares of Class A promotional stock and 9,000 shares of Class B stock. (Tr. 2731-2734.) At present Future has 15 voting shareholders and 9 non-voting shareholders, who have the stock interests and corporate positions set forth below.

| Name | Office Held | Director | Interest * | Percentage of Voting Stock |
|---|---|---|---|---|
| Maritza L. Garrido | | Yes | 8% (VS) | 10.96% |
| E. Ruth Mezquita | Treasurer | Yes | 8% (VS) | 10.96% |
| Margaret N. Daniels | President | Yes | 7% (VS) | 9.59% |
| Ester G. Renteria | Secretary | Yes | 6% (VS) | 8.22% |
| Denise Smith | | Yes | 6% (VS) | 8.22% |
| Natalia Bell | | Yes | 4% (VS) | 5.48% |
| Connie P. Cruz | | Yes | 4% (VS) | 5.48% |
| Lemuel Daniels | Vice President | Yes | 4% (VS) | 5.48% |
| Hazel L. Haynes | | Yes | 4% (VS) | 5.48% |
| Earl Jones | Vice President | Yes | 4% (VS) | 5.48% |
| Bert Rosario | | Yes | 4% (VS) | 5.48% |
| Martin G. Serna | | Yes | 4% (VS) | 5.48% |
| Stephen T. Toshiyuki | | Yes | 4% (VS) | 5.48% |
| Reginald Turner | | Yes | 4% (VS) | 5.48% |
| Louis H. Morton | Vice President | Yes | 2% (VS) | 2.74% |
| N. Arthur Astor | | No | 4% (NVS) | -- |
| Vikki Carr | | No | 4% (NVS) | -- |
| Judy Howard | | No | 4% (NVS) | -- |
| Lawrence N. Daniels | | No | 3% (NVS) | -- |
| Lewis K. Irwin | | No | 3% (NVS) | -- |
| Arnold Mills | | No | 3% (NVS) | -- |
| Richard H. Sommers | | No | 3% (NVS) | -- |
| Evelyn Stein | | No | 2% (NVS) | -- |
| Jane D'Auvray | | No | 1% (NVS) | -- |

[* VS = Voting Shares and NVS = Non-Voting Shares]

The 15 voting stockholders of Future hold 73 percent of the equity of the corporation. (Future Exh. 16.)

48. Prior to the 1984 "B" cut-off date, Future had two classes of voting stock: Class A shares which were non-assessable and which were held only by Ms. Daniels, and Class B shares which were assessable. (RKO Cross Exhs.

14, 15; Tr. 2755; 2903-2904.) Shortly before the "B" cut-off date Future decided to change its structure to improve its comparative position. (Tr. 2887-2888.) Non-minority shareholders, other than Ms. Daniels, and shareholders who were not proposing full-time employment at the station, exchanged their Class B voting shares for Class C non-voting shares or transferred their shares to other persons who would improve the applicant's comparative position. (RKO Cross Exh. 18; Tr. 2887-2888.)

49. Prior to the 1984 amendment, only 5 of its present fifteen voting shareholders proposed to work full-time at the station. Ms. Daniels proposed to work as the Station Manager and Mr. Morton proposed to work as the News Director. Ms. Ester Renteria, who now proposes to work full time as Public Affairs Director, proposed to be its Advertising and Promotion Director. Two other stockholders, Mr. Rosario and Mr. Jones, proposed integration in non-management positions as "account executives" in the sales department. But Drs. Garrido and Mezquita, Messrs. Daniels, Serna, Toshiyuki, and Turner, all of whom were stockholders in 1980 and all of whom had an opportunity to propose to work at that station, declined to do so. (RKO Cross Exhs. 15, 16; Tr. 2878.) Two of the now integrated shareholders, Ms. Haynes and Ms. Cruz, are the wives of initial stockholders. Neither these women nor their husbands proposed initially to work at the station. (Tr. 2878-80.)

*Integration Of Ownership Into Management*

50. All fifteen shareholders who now hold all of the voting stock in Future propose to work full time (a minimum of 40 hours per week) at the station in various positions. (RKO Cross Exh. 17.) They are:

| | |
|---|---|
| Maritza L. Garrido | Financial Manager |
| E. Ruth Mezquita | EEO/Women's Affairs Director |
| Margaret N. Daniels | Station Manager |
| Ester G. Renteria | Public Affairs Director |
| Denise Smith | Operations Manager |
| Natalia Bell | Sports Director |
| Connie P. Cruz | Public Service Director |
| Lemuel Daniels | General Manager |
| Hazel L. Haynes | Minority Affairs Director |
| Earl Jones | Local Sales Manager |
| Bert Rosario | Program Director |
| Martin G. Serna | General Sales Manager |
| Stephen T. Toshiyuki | National Sales Manager |
| Reginald Turner | Advertising and Promotion Director |
| Louis H. Morton | News Director |

51. *Maritza L. Garrido* is to be integrated into management as full- time (minimum 40 hours per week) Financial Manager. (Future Exh. 5 at 3.) She will be responsible for development of the station's business plan and financial policies and she will supervise the station's comptroller and outside accountants. (Future Exhs. 5, 16; Tr. 3245-3251, 3343-3347.)

52. Dr. Garrido is an Hispanic female who has resided in Los Angeles County since 1959. She received a B.S. degree in 1955 from the University of Richmond, Virginia, and in 1959 an M.D. degree from the Medical College of Virginia School of Medicine. She is a mother and practices pediatrics less than full-time. (Tr. 3334.)

53. Since 1960, Dr. Garrido has held memberships in the Los Angeles County Medical Association, the California Medical Association and the Los Angeles Pediatric Society. She has been a member since 1965, and has served terms as President (1976-77), Treasurer (1977-79), (1985-present), and Finance Chairman (1975-76) of the Footlighters, Inc., a charitable organization which supports children's programs in the Los Angeles area. Since 1975, she has been a member, Treasurer, Finance Chairman, Fund Raising Committee Member and Ball Chairman of Achievement Rewards for College Scientists, a charitable organization which raises scholarship funds. (Future Exh. 5.)

54. *E. Ruth Mezquita* is to be integrated into day-to-day management as a full-time Equal Employment Opportunity/Women's Affairs Director (Future Exh. 8 at 3.) She will supervise and make policies for the station's Personnel Department, counsel other managers to assure maintenance of the station's EEO policies, and ensure the station's responsiveness to women's needs and issues in its programming and in its employment. (*See* Tr. 3606- 3610, 3612-3616.)

55. Dr. Mezquita is an Hispanic female who has resided in the City of Los Angeles since 1978 and in the Los Angeles area since 1968. She earned a medical diploma from the University of El Salvador in 1963, and since 1975 she has been a private practitioner in psychiatry. As an indication of her interest in entering the broadcast field, it is recognized that in 1984 she took an extension course at UCLA in financing, engineering, staffing, and programming of radio stations and a course in related FCC regulations and requirements.

56. Since 1980, Dr. Mezquita has appeared regularly on Los Angeles station KMEX-TV's educational programs where she discussed subjects relating to Hispanics and the behavioral sciences. Since 1984, she has acted as resource person for the Inter-Faith Movement in Los Angeles which is concerned with the welfare of Central American emigres. In the fall of 1986, she delivered a series a lectures on the Psychodynamics of Immigrant Populations at the Southern California Psychoanalytic Institute. In 1975, she helped organize the first Satellite Veterans Clinic and from 1980-84 she helped to organize Temple Skir Shalom, a reformed Jewish congregation. In 1969-70, she worked at an East Los Angeles child and youth clinic serving primarily Spanish-speaking children. There she conducted voluntary training of pediatric paraprofessionals. She also is a member of the El Salvador Chamber of Commerce of Los Angeles. *Id.*

57. *Margaret N. Daniels* is to be integrated into management as full- time Station Manager. (Future Exh. 4 at 4-5.) She will implement policy as set by the board of directors, she will coordinate the activities of all station departments, and she will resolve conflicts. Also, she will carry out liaison with the station's FCC attorneys, she will supervise the Editorial Director, and she will set the editorial policy of the station. (*Id.* at 5.)

58. Ms. Daniels has lived in the Los Angeles area since 1961. She graduated with an Associate Arts degree from the Marjorie Webster Junior College in 1947 with a major in radio. She has taken continuing education classes in radio at American University in Washington, D.C. and in 1984 she took three semesters of classes at UCLA in radio broadcasting management. In the years 1947-1948, Ms. Daniels worked for radio station WBCC in Bethesda, Maryland. She was its disk jockey, announcer, and en-

gineer for music shows, local talk shows, and live commercials. She also was the station's assistant music director, music director, and program director. In 1949, she joined the Radio and Television Director's Guild of New York. She became a freelance writer and production assistant on NBC-TV's "Television Screen Magazine." She continued working as a freelance production assistant on NBC-TV network shows and in 1951 she was accepted on NBC's permanent staff. In 1952, she became the staff associate director at the NBC-TV network and in that capacity she worked on numerous network shows from 1952-1961. In 1961, she resigned from NBC and moved to California. During the years 1968-1970, she was assistant or associate producer for network TV specials and shows and since 1971, she has worked as a freelance photographer. From 1971 to 1982, she was a partner in "Photo-Insure," a service which provided photographic documentation of of business and home interiors for insurance purposes. (*Id.*)

59. Since 1961, Ms. Daniels has been a member of the Directors Guild of America (DGA), Hollywood Chapter. In 1973, she founded and has continued to be an active member of the Women's Committee for the DGA, Hollywood Chapter. She also is a Lifetime Member of the Lanai PTA. From 1975 to 1981, she served on the board of directors of the UCLA Medical Center Auxiliary, where she volunteered her photographic and writing skills and published the *Time & Service* magazine. In 1980, she served as Media and Community Advisor to the Los Angeles Bicentennial Committee. Since 1981, she has been a member and active fund-raising participant in a money-making venture of the Rainbow Organization which donates its profits to the Amie Karen Center for the Treatment of Children with Cancer, Los Angeles. Since 1984, she has been the manager of a gift shop for the UCLA Neuro-Psychiatric Institute and Hospital and in 1985, she was honored for having devoted over 2,000 hours of service to the UCLA hospital. (*Id.*)

60. *Ester G. Renteria* is to be integrated into the day-to-day management of the station as full-time Public Affairs Director. She will supervise the employees of the Public Affairs Department and develop policies to ensure that the station's programming meets the needs, problems, and issues facing the diverse Los Angeles community. (Future Exh. 10 at 4.)

61. Ms. Renteria has been a resident of the East Los Angeles-Montebello area since her birth in 1939. She is a Hispanic female and she received an Associate in Arts degree in 1958 from East Los Angeles College. She received a bachelor's degree in journalism/broadcasting from California State University, Los Angeles, in 1974. It is accepted as an indication of her interest in a career in broadcasting that she has taken courses in television production and public relations under a UCLA extension program. In 1959, she became a reporter at the *Alhambra Post Advocate*, a daily newspaper. From 1962 to 1968, she was a reporter and editor of the *East Los Angeles Tribune and Gazette*. From 1968-69, she was a desk editor and newswriter at KNX radio. From July 1969 to July 1970, she was associate producer and hostess-moderator of the nightly television series "Ahora!" on KCET, Channel 28, Los Angeles. From 1970 to 1983, she served as public information director for East Los Angeles College. From 1970 to 1974, she was associate producer for two KNXT (CBS) television series and, from 1979 to 1982, she was the educational consultant for a KNXT-TV bilingual education series. Since 1983, she has owned her own bilingual public relations agency, Ester Renteria Public Relations, Inc. (*Id.*)

62. Ms. Renteria has been a member of the board of directors of the Bilingual Foundation of the Arts from 1974 to 1978. She founded and, since 1984, has been vice president of the Hispanic Public Relations Association. Since 1984, she has been Publicity Committee Chair for the Hispanic Academy of Media Arts and Sciences. She has been a member of the Latin American Professional Women's Club of Los Angeles since 1982 and of the Latin Business Association in Los Angeles since 1983. Since 1974, she has been a member of the executive board of the "16th of September Festival Committee," which annually stages in Los Angeles a celebration of Mexican Independence. (*Id.*)

63. Ms. Renteria has received recognition for her local civic activities. She also worked on a volunteer basis from 1977 to 1983 as public relations director of the annual Los Angeles Street Scene Festival and she served as the voluntary statewide publicity director of the 1980 Chicana Issues Conference. (*Id.*)

64. *Denise Smith* is to be integrated into management as full-time Operations Manager. (Future Exhibit 13 at 2.) She will supervise the Operations and Engineering Department. She will have sole managerial authority to make all day-to-day policy decisions regarding engineering matters. She will hire and supervise the station's Chief Engineer. (Future Exh. 13 at 2.; *see* Tr. 3810-3812.)

65. Ms. Smith has been a resident of Los Angeles County since 1965. She is a Black female. Ms. Smith attended Santa Monica City College from 1977 to 1979. She was employed by KGFJ and KUTE(FM) Los Angeles from 1979 through January 1, 1986. From 1981 to 1984, she was Promotions Director for KGFJ and Public Service Director for KGFJ and KUTE(FM). From 1982 until December, 1984, she hosted a weekly, 30-minute public affairs program on KGFJ. (*Id.*)

66. Ms. Smith has been a member of the Los Angeles Chapter of the Southern Christian Leadership Conference since approximately 1982. She has worked with the Los Angeles Chapter of the NAACP since 1981 and joined that organization in 1984 and from 1983 to 1985 she was co-chair of its fund raising. She has been a volunteer for Kedren Community Mental Health Center since 1973 and volunteer administrative assistant to a non-profit youth organization since 1982. She also has been member of the Los Angeles Urban League since 1983 and she has received several community service awards. (*Id.*)

67. *Natalia Bell* is to be integrated into management of the station as the full-time Sports Director. She will determine the sports coverage policies of the station and supervise all of the Sports Department's employees. (Future Exh. 1 at 2; *see* Tr. 3132-3136.)

68. Natalia Bell has resided in the Los Angeles metropolitan area since 1960 and in the City of Los Angeles since 1980. She is a Black female. Ms. Bell received a B.A. from the University of California at Los Angeles in 1982. (*Id.*)

69. Since 1982, Natalia Bell has organized food programs for underprivileged families in the Los Angeles area. Since 1984, she has been president of the Ricky Bell Memorial Scholarship Fund, a foundation to help economically disadvantaged high school students to attend college. *Id.* She has conducted broadcast interviews on

behalf of the Scholarship Fund on KNBC- TV, KHJ, KJLH-FM, and KGFJ, all of which are Los Angeles broadcast stations. (*Id.*)

70. *Connie P. Cruz* (Future Exh. 16), is to be integrated into management of the station as full-time Public Service Director. She represents that she will determine the station's overall policies regarding public service announcements and that she will supervise a staff that will maintain contacts with, and strive to meet the needs of, Los Angeles area community groups through the station's public service programming. However, she has no idea of the size staff she will need and she has not planned even for an announcer. (Tr. 3188-90.) Nor has there been a decision of public service responsibilities between public service and minority affairs. (Tr. 3213-14.) Her husband was a shareholder in 1980. When the reorganization occurred in 1984, he apparently was unwilling to integrate into management and he transferred his stock to his wife, Ms. Cruz. (Tr. 3164.)

71. Ms. Cruz has been a resident of the Los Angeles area since 1949. *Id.* at 1. She is a Hispanic female. *Id.* (Future Exh. 2 at 1-3.) Ms. Cruz attended Los Angeles City College, Mount San Antonio College and UCLA. As an indication of her interest in the broadcast field, in 1984, she took a course in radio broadcasting at UCLA. From 1960 to 1968, she held various administrative positions with the City of Los Angeles and from 1968 to 1970, she was administrative secretary to a councilman. From 1981 through 1984, she worked as a business consultant. (*Id.*)

72. Ms. Cruz has coordinated social and business functions since 1970 for the Philippine Medical Society and Filipino-American Junior Chamber of Commerce. She served on the Advisory Board at Mesa Robles School and Mesa Robles Junior High School since 1982, and on the PTA Administrative Board as Vice President since 1983. Since 1984, she has been a member of the Parent Board and Sports Boosters at Bishop Amat High School, where she has organized programs and group projects, made presentations to parents, and prepared news releases for local newspapers. In December 1984, she led a group of over 100 students and parents in decorating a Rose Bowl Parade float to raise school funds. She was appointed to the Hacienda-La Puenta School District's Advisory Board in 1984. She has been a Girl Scout Leader, Cub Scout Leader, and Camp Fire Leader since 1980 and served on the Youth Programs Board at St. John Vianney Church from 1981-1983. (*Id.*)

73. *Lemuel Daniels* is to be integrated into day-to-day management as full-time General Manager. Mr. Daniels will be the station's senior-ranking manager and in that capacity he will preside at staff meetings and make policy for the station. He will supervise the station's corporate lawyers. He will maintain contacts with national and state broadcast organizations, generally represent the station in any network or union negotiations and he will serve as liaison to the corporation's board of directors. (Future Exh. 3 at 2-3.)

74. Mr. Daniels has been a resident of Los Angeles County since 1973 and of the City of Los Angeles since 1979. He is a Black male. Mr. Daniels received a B.S. degree in Radio-TV Communications in 1971 from Southern Illinois University, Carbondale, Illinois. In 1970, he worked as a disc- jockey at WSIU-FM, Carbondale, Illinois. From 1971 to 1972, he worked as a public relations associate for Illinois Bell in Chicago where he did the "Picturephone News" each business day and was also associate producer of the Al Benson Show, a local television dance program. From 1973 to 1974, he was an account executive with KAGB-FM (now KACE-FM), Inglewood, California; a record marketer for Martin Gilbert, Inc., and a freelance prop man for various productions including NBC-TV's "Tonight Show." Since 1975, he has been employed in the brokerage industry and currently is a vice president of Bear, Stearns & Co., a national brokerage firm. *Id.* at 1.

75. Mr. Daniels has been a member of the NAACP and the Los Angeles Urban League since 1980 and has worked with the Urban League since 1975. Since 1984, he has been on the board of directors of the Institute of Destructive Behavior and Suicide Prevention Centers. Since 1983, he has been a board member of the Dignity Center of Los Angeles and a member of the board of directors of the W.E.B. DuBois Academic Institute. He has been a member of the National Urban Bankers, Los Angeles Chapter, since 1984, and a member of the UCLA chancellor associates since 1982. He was a board member of the Crenshaw YMCA in 1981. (*IdHazel L. Haynes* is to be integrated into the day-to-day management of the station as full-time (minimum 40 hours per week) Minority Affairs Director. She will be responsible for developing policies to ensure that the needs and viewpoints of minority group individuals are reflected in the station's programming. She will supervise employees in the Minority Affairs department and will chair the station's minority affairs advisory committee. (Future Exhibit 6 at 1-2.)

77. Ms. Haynes has lived in the Los Angeles area since 1970. She is a Black female. She received a B.A. in 1949 from Atlantic Union College, South Lancaster, Massachusetts. From 1949 to 1970, she was an elementary and junior high school teacher. (*Id.*)

78. From 1970 to 1976, Ms. Haynes served on the board of directors of the UCLA Medical Center Auxiliary. She has served as chairman of the Auxiliary's Memorials and Tribute Committee (1971-73) and as Vice President of Membership (1973-75). From 1972 to 1974, she was a consultant to various programs in the Los Angeles County Parks' Tiny Tots program. From 1973 to 1974 and from 1979 to 1981, she was a board member in a minority training program with the Los Angeles Symphony. From 1979 to 1980, she served as chairperson for Friends of Drew, a fund raising organization for the Charles Drew Post-Graduate Medical School, and appeared on various Los Angeles area radio and TV stations. (*Id.*)

79. *Earl Jones* is to be integrated into management as full-time Local Sales Manager. He proposes to be responsible for making station policy regarding all local sales matters and will supervise employees in his department. (Future Exh. 7 at 2-3; Tr. 3535-3538, 3543-3549.) In fact, Mr. Jones will report to Mr. Serna, the General Sales Manager, and the latter will be setting the sales budget. (Tr. 3535-36.)

80. Mr. Jones has been a resident of the Los Angeles area since 1937 and has lived in the City of Los Angeles since 1971. He is a Black male. He attended Los Angeles City College from 1955 to 1958 and Los Angeles State College from 1958 to 1959. From 1960 to 1981, he was employed as a sales representative for various companies and, since 1981, he has been an account salesman for the National Distillery Company of Los Angeles. Mr. Jones is also a partner in Hearle Investment Corporation which owns the "Chicken George" restaurants. (*Id.* at 1-2.)

81. Since 1972, Mr. Jones has been a member of the Holman United Methodist Church where he has formulated and written press releases regarding the church's activities and fund raisers. From 1974 to 1976, he served as president of the Church choir which has given concerts for the Los Angeles community. From 1974 to 1983, he served as recreational director for the Church's "Learning Tree" program for children. From 1975 to 1980, he was the advisor to the Church's Methodist Youth Fellowship, and from 1977 to 1983, he served as Youth Coordinator of the Church. (*Id.*)

82. *Bert Rosario* is to be integrated into management of the station as full-time Program Director. His responsibilities will include the formulation of the station's programming policies and supervision of all announcers and Program Department personnel. (Future Exh. 11 at 2; *see* Tr. 3411-3426.)

83. Mr. Rosario has resided in the Los Angeles area, in the City of North Hollywood and Studio City, since 1968 – with the exception of a five- year interruption between 1971 and 1976. He is a Hispanic male. He received a B.A. degree in Theatre Arts from California State University, Northridge, in 1971. From 1971 to 1973, he continued with post-graduate work toward an M.F.A. at the University of Minnesota, Minneapolis, under a fellowship from 1971 to 1973. Since 1973, Mr. Rosario has been a freelance professional actor, a member of Actors' Equity Association and, since 1974, a member of the American Federation of Television and Radio Artists. Since 1976, he also has been a member of the Screen Actors' Guild. He has acted professionally on radio, television, stage and screen since 1973. (*Id.*)

84. Mr. Rosario records books regularly for the Braille Institute in Los Angeles on a volunteer basis. He has been a member of the Group Repertory Theatre, a community-based theatre located in North Hollywood since 1977 and served on its Board of Directors from 1981 to 1983. From 1980 to 1984, he was a member of Nostros, a Hispanic performers' political action group. Since 1977, he has been called upon several times a year as a guest lecturer at the theatre department of Cal State, Northridge. (*Id.*)

85. *Martin G. Serna* is to be integrated into management of the station as full-time General Sales Manager. He will have responsibility for making the general sales policies for the station. (Future Exh. 12 at 2; *see* Tr. 3495-3498.) He will set quotas for sales performances and he will coordinate the sale of spot times. (Tr. 3545-46.) Mr. Serna purchased his stock in 1984 and was part of the reorganization to strenthen Future's proposal. While there is a conflict in the testimony, it is found based on Mr. Jones' testimony that Mr. Serna's purchase was conditioned upon his accepting this policy making job. (Tr. 3532-33.)

86. Mr. Serna has lived in the Los Angeles area Since 1968 and in the City of Los Angeles since 1979. He is a Hispanic male. Mr. Serna received a B.A. in 1963 from the School of Communications, University of Washington, in Seattle. Since 1982, he has owned Martin Serna Communications, Inc., Los Angeles, an advertising/media sales company. In 1984 and through May, 1985, he was full-time account executive for KLAC/KZLA-FM radio stations in Los Angeles. From 1981 to 1982, he was employed as account executive and occasionally served as Acting General Sales Manager for KBSC-TV in Los Angeles. From 1979 to 1981, he was employed as a sales account executive for KMEX-TV, the Spanish International Network affiliate in Los Angeles. From 1976 through 1979, he was President, part owner, and Account Supervisor for Dolan/Hammond/ Serna, Inc., a Los Angeles Advertising agency. From 1975 to 1976, he was employed as a senior account executive for Martin Advertising in Tustin, California. From 1973 to 1975, he was employed as a sales account executive for AVCO Radio and Television Sales in Los Angeles. Mr. Serna was employed as a senior account executive for Laverne & Jacoby Advertising in Los Angeles from 1972 to 1973, and for Gumpertz, Bentley and Dolan Advertising in Los Angeles from 1970 to 1972. From 1968 to 1970, he was an account executive for Sheldon Marks Advertising in Beverly Hills, California. (*Id.*)

87. Mr. Serna served as assistant den leader of the YMCA Indian Guide Program for the Whittier region from 1969 to 1971. From 1970 to 1973, he was on the executive committee for the Avocado Heights Little League and Assistant Manager for three different baseball teams. From 1974 through 1980, he was a member of the Los Angeles Advertising Club. (*Id.*)

88. *Stephen T. Toshiyuki* is to be integrated into management as full-time National Sales Manager. He will make policy related to the national sales activities of the station and supervise employees in that department and/or outside representatives. (Future Exh. 14 at 2; *see* Tr. 3648-3664.) He expects to hire a national sales representative and although he personally intends to set prices for spots, he could not differentiate how separate systems for local and national pricing would be implemented. (Tr. 3656.) He was unsure of his staffing needs. (Tr. 3663.) He did not commit himself to this position until the 1984 reorganization and it appears he had to take this position in order to keep his voting stock. (Tr. 3644-45.)

89. Mr. Toshiyuki has been a resident of Los Angeles for 40 years. He is a Japanese-American male. Mr. Toshiyuki received a B.A. from California State University at Northridge in 1968. He has been an account executive in the securities industry since 1971. He has participated in activities for the American Civil Liberties Union, Japanese-American Citizens League, and local Optimist Club since the early 1960's. (*Id.*)

90. *Reginald L. Turner* is to be integrated into management of the station as full-time Director of Advertising and Promotions. He will determine the station's promotional policies, supervise the station's promotional and advertising activities and have sole managerial authority to make the day-to-day decisions regarding the Advertising and Promotions Department. (Future Exh. 15 at 2.)

91. Mr. Turner has resided in the City of Los Angeles since 1979. He is a Black male. Mr. Turner received a B.A. from Stanford University in 1975 and a J.D. from Georgetown University in 1978. From 1971 to 1973 and in 1975, Mr. Turner wrote a newspaper column for the Palo Alto newspaper. From 1973 to 1975, he was Sports Director and Director of Black Programs for KZSU- FM, Palo Alto, California. Since 1982, he has been President and Chief Executive Officer of the Reginald Turner Management Group, Inc., a sports and entertainment management firm. From 1983 until February 1986, he was a non-voting member of the Board of Directors of Associated Publications, Inc., an Illinois company that publishes approximately 15 specialty and women's magazines. (*Id.*)

92. Since 1979, Mr. Turner has been a member of the First AME Church, Los Angeles. From 1979 to 1980, he was a member of the Beverly Hills Bar Association and the Langston Hughes Bar Association. Since 1981, he has

been an auxiliary member of LINKS, a Black women's community organization in Los Angeles. For the past three years, he has sponsored, directed and participated in the West Los Angeles Basketball League. Mr. Turner has sponsored inner-city youths to attend Hero Sports Basketball Camp. Since 1983, he has officiated at the Southern California Special Olympics and, in 1984, he hosted a special gathering of minority athletes for the summer Olympics in Los Angeles. *Id.*

93. *Louis H. Morton* is to be integrated into management of the station as full-time News Director. His responsibilities will include determining the overall news policy for the station and supervision of the news staff. (Future Exh. 9 at 2.)

94. Mr. Morton has been a resident of Los Angeles since 1970. He is a Black male. Mr. Morton received a B.S. from Southern Illinois University in 1966 and a journalism certificate in 1968 from Columbia University's Graduate School of Journalism. Mr. Morton has been employed as a broadcast journalist in Seattle at KING (1968-70) and in Los Angeles at KBIG (1970-72), KMPC (1972- 79), KCET-TV (1980, freelance), KJLH-FM and KCET-TV (1981-83), KFWB (1984), and KCOP-TV (1984-85). At KCOP-TV, he served as Assignments Editor for all news staffers. In 1975, he taught broadcast journalism for one semester at the Annenberg School of Communications at the University of Southern California. (*Id.*)

95. Since 1970, Mr. Morton has given numerous talks in Los Angeles schools encouraging young people to continue their education. Since about 1981, he has given workshop seminars from his home to help young people sharpen their speaking skills. He is a founder and member of the Black Journalists Association of Southern California. In 1983, he received awards for outstanding service to the Los Angeles community. (*Id.*)

***Valley Radio 670***

***The Applicant***

96. Valley is a California limited partnership composed of Manuel A. Cabranes, general partner, and Robert C. Landegger, limited partner. Mr. Cabranes owns 51 percent of the partnership equity and has 100% of the partnership voting power. (Valley Exh. 1, p. 2; Tr. 1710, 2157.)

***Integration of Ownership Into Management***

97. Valley proposes to integrate Mr. Cabranes into management. He proposes to work full-time (a minimum of forty hours per week) at the station as General Manager. He will have responsibility for all station operations, including, programming, staffing, sales and other functions. (Valley Exh. 2, 1.)

98. Mr. Landegger owns 49% of the partnership equity but he has no voting authority. (Valley Exh. 1, p. 2; Tr. 1710.) The limited partnership agreement states in pertinent part:

> Limited partners shall contribute no services and shall take no part in or interfere in any manner with the management, conduct or control of the partnership business and shall have no right or authority to act by or for the partnership, except as otherwise permitted by all present and future laws of the state of California which are applicable now or hereafter will come applicable to limited partnerships.

(Marisol Cross Exh. 1, para. 33, at p. 10.) The powers of Mr. Landegger as Valley's limited partner are as follows:

> (a) Election or removal of general partners;
>
> (b) Termination of the partnership;
>
> (c) Amendment of the partnership agreement;
>
> (d) Sale of all or substantially all of the assets of the partnership;
>
> (e) Admission of additional limited partners;
>
> (f) Admission of an additional general partner or partners; and
>
> (g) Such other powers as are expressly authorized for a limited partner to exercise, if he chooses, under the statutes of the State of California applicable to a limited partnership at present or such statutes that may become effective hereafter, all of which are incorporated by reference without the necessity of any written amendment to this partnership agreement/ certificate.

(Marisol Cross-X Exh. 1, para. 34 at p. 10; Future Cross Exh. 12, para. 13 at 4.)

99. Mr. Landegger's initial contribution to the partnership was $40,000. Mr. Landegger contributed a total of $210,000 to Valley and he has been a ready source of available funding for the radio station. (Tr. 1713, 1816; Tr. 1832; 2106-07.)

100. Mr. Landegger owns the land for the transmitter site for station KWNK in Simi Valley, and leases it to the partnership at the rate of $7,000 per month. (Tr. 1837-1838.) Mr. Landegger also became actively involved in negotiations with the landowner. (Tr. 2129-2130.) Mr. Landegger worked out his own deal with the landowner and Mr. Cabranes admitted that he was not even aware of the terms of that deal. (Tr. 2130.) From time to time Mr. Landegger has mentioned potential advisors to Mr. Cabranes. (Tr. 1838-1839; 2030-2032.) Mr. Landegger also testified that he discussed with Mr. Cabranes the advertising for his newspapers and that Mr. Cabranes ran ads for Mr. Landegger's publications and in turn Mr. Landegger's papers would run ads for his publication, or for his radio station. (Tr. 1839; 2106- 2109.) Mr. Cabranes discussed the need for a bank loan with Mr. Landegger and Mr. Landegger suggested that Mr. Cabranes apply for the loan at Simi Valley Bank. (Tr. 1801-02; 2114.) The bank loan is secured by Mr. Cabranes' personal assets and the assets of the station.

101. Manuel A. Cabranes is an Hispanic male. Since 1981, he has resided at 4072 Township Avenue, Simi Valley, California, which is the service area of the proposed stations. (Valley Exh. 2, p. 1.) From 1974 through 1978, he resided at 2081 North Potter Avenue, also in Simi Valley, which is also within the service area of the proposed station. (*Id.*)

102. Mr. Cabranes' community involvement consists of an appointment to the Board of Directors of the Simi Valley YMCA for the fall of 1985. He has devoted 3-5 hours per month to fundraising activities for the Simi Valley YMCA since 1984. During 1974-1978 and 1981-1983 Mr. Cabranes was one of the founders and then a director of the Los Angeles Puerto Rican Scholarship Fund. Mr. Cabranes has devoted 5-6 hours per month since 1984 to fund raising activities for the Boys and Girls

Club of Simi Valley and has devoted 3 hours per month since 1985 to the Simi Valley Rotary Club and 3 hours per month since 1984 to the Simi Valley Cultural Association. Mr. Cabranes is currently employed as the General Manager of KWNK. He has been employed in that capacity since September 22, 1984. Upon grant of the Los Angeles radio station, he will sever all connections with KWNK. (Valley Radio Exh. 2, pp. 1-3.)

*South Jersey Radio, Inc.*

*The Applicant*

103. South Jersey is a New Jersey corporation which was organized for the purpose of acquiring and operating broadcast stations. Its officers, directors and shareholders are:

| | | |
|---|---|---|
| Howard L. Green | President and Director | 50% Shareholder |
| Donald M. Simmons | Vice-President and Director | 50% Shareholder |
| Joseph J. Jackler | Secretary and Treasurer | |

(South Jersey Exh. No. 1, (AM) and Exh. No. 1 (FM).)

*Integration of Ownership Into Management*

104. South Jersey represents that it does not propose to integrate any of its principals into the day-to-day operation or management of the proposed station. *See* South Jersey's Proposed Findings at 2. Since no integration is proposed, South Jersey may not claim any comparative enhancement for minority or female ownership.

*Cozzin Communications Corporation*

*The Applicant*

105. Cozzin has the following shareholders:

| | |
|---|---|
| Bill Cosby | 51% |
| Joseph T. Zingale | 49% |

Mr. Zingale is President, Secretary and Director of Cozzin, which has no other officers or directors. Mr. Zingale holds an option to purchase an additional 2% of Cozzin's stock from Mr. Cosby in the event that Mr. Cosby dies, becomes disabled, or disposes of his shares. (Cozzin Exh. 4.)

*Integration of Ownership Into Management*

106. Cozzin does not propose any integration of ownership into management of the proposed Los Angeles and Beverly Hills radio stations. *See* Cozzin's Proposed Findings at 6. Since no integration is proposed Cozzin may not claim any comparative enchancement for minority ownership.

*Marisol Broadcasting, Ltd.*

*The Applicant*

107. Marisol is a limited partnership organized under the laws of the state of California. Based on an amendment filed just prior to the "B" cut-off, March 28, 1984, the partnership is now composed of six individuals. Four of those individuals are designated to be both general partners and limited partners, one individual is only a general partner, and one individual is only a limited partner. (Marisol Exh. 1.) The respective ownership interests of the partners of Marisol are set forth below:

| Name | Partnership Interest+ | Interest Held As Limited Partner* | Interest Held As General Partner ** |
|---|---|---|---|
| Diana Padilla Brimberry | 17.84% (11.21% general partner, 6.63% limited partner). | 11% | 29% |
| Chris Equihua-Holm | 12% (12% general partner). | 0% | 31% |
| Fernando Inzunza | 17.84% (.77% general partner, 17.07% limited partner). | 28% | 2% |
| Sandra Serrano Sewell | 23.79% (6.96% general partner, 16.83% limited partner). | 27% | 18% |
| Elizabeth Chavez | 10.7% (7.73% general partner, 2.97% limited partner). | 5% | 20% |
| George Castro | 17.84% (17.84% limited partner). | 29% | 0% |

\+ Expressed as percentages of total partnership interests.

* Expressed as a percentage of total interests held as limited partner interests.

** Expressed as a percentage of total interests held as general partner interests.

(Marisol Exh. 1, Future Cross Exh. 3.)

The amendment also provided that two of the original general partners, Mr. Inzunza and Mr. Sewell, would then have a dual status as concurrent general partners and limited partners.

108. On May 12, 1983, when Marisol filed its application, the partnership had a different configuration. It was comprised of three persons who were designated to be general partners, collectively owning 70% of the equity. There was one designated limited partner holding a 30% equity interest. These initial equity interests may be repre-

sented by percentages in the following manner:

| | | |
|---|---|---|
| Inzunza | - General Partner | - 30% |
| Sewell | - General Partner | - 30% |
| Equihau-Holm | - General Partner | - 10% |
| Castro, George | - Limited Partner | - 30% |

109. Mr. Inzunza considered himself to be the "prime mover" of Marisol's application at the time it was filed. (Tr. 463.) He retained Mr. Paul Zevnik, the legal counsel who assisted in the preparation of Marisol's application and who drafted the partnership agreement. (Tr. 464, 491.) Ms. Sewell and Ms. Holm were invited to participate by Mr. Inzunza's personal one- on-one solicitations. (Tr. 476.) But these two general partners did not participate in structuring the partnership agreement or in assessing costs of prosecution and construction. (Tr. 480, 486-87, 492-93.) Mr. Inzunza was the custodian of the partnership documents, his address was designated as the partnership's place of business, he signed the application and he was the only partner to review the application before it was filed. (Tr. 496, 511- 12.)

110. Mr. Inzunza became apprised of the opportunity to seek RKO licenses through the trade press but his interest in applying was "sparked" by Mr. George Castro's brother, Mr. Thomas Castro. (Tr. 462, 594.) Mr. Inzunza and Mr. Thomas Castro had a prior broadcast business relationship in an applicant for an FM radio station in Los Angeles, called Coronado Broadcasting of Southern California (Coronado). Mr. Inzunza was solicited by Mr. Thomas Castro and, although Mr. Inzunza's interest in Coronado was only 1%, he did participate to a small extent in its ascertainment study sometime in 1981 or 1982. (Tr. 463, 468.) Mr. Inzunza also had an association with Thomas Castro through the former's work as investment manager for the Caldera family. (Tr. 468-69, 522.) Other more significant links between Mr. Inzunza and Mr. Thomas Castro are indicated by Mr. Castro's recommendation of Marisol's original attorney and Ms. Sewell as a potential partner. The fact that Mr. Inzunza and Mr. Thomas Castro had served as director of "Caminos," a non- profit magazine, is an additional indicator of a preexisting association. (Tr. 740-42; 595-96.)

111. The evidence also establishes that Mr. Zevnik has previously represented Mr. George Castro in an FCC application in which Mr. George Castro was an integrated principal. Also, Mr. Zevnik recommended Mr. George Castro to Mr. Inzunza as a partner and Mr. Inzunza selected the same engineer who had performed similar services for Mr. George Castro. (Tr. 596-97, 601.) Mr. George Castro agreed to contribute engineering reports and exhibits to the Marisol effort and Marisol's engineer billed Mr. George Castro, although the bill was received by Mr. Inzunza. (Future Cross Exh. 1 at 3; Tr. 597.) Mr. George Castro's advice also was solicited at least one time at a partnership meeting. (Tr. 1097.)

112. It was Mr. Thomas Castro who suggested that Mr. Inzunza contact Ms. Sewell and Hector Molina as potential participants and he even aided Mr. Inzunza in contacting Ms. Sewell. (Tr. 595-596.) Mr. Inzunza first approached Mr. George Castro about becoming involved. He then spoke individually to Hector Molina, Ms. Holm, and to Ms. Sewell. (Tr. 475.) Ms. Holm called back within two days. Ms. Sewell got back to Mr. Inzunza even faster. (Tr. 476, 481.) Mr.George Castro never committed to becoming integrated into the station's operations. (Tr. 479.) It was Mr. Zevnick who suggested that the applicant take the form of a limited partnership and Mr. Inzunza went along with that suggestion after only a few days consideration. Mr. Inzunza initiated Marisol's engineering through the specialist recommended by Mr. George Castro. (Tr. 474, 612.)

113. Ms. Sandra Serrano Sewell first heard of the opportunity to apply for KRTH(FM) from Mr. Thomas Castro as they moved in the same social circles. (Tr. 739-40.) Ms. Sewell knew from the beginning that Mr. George Castro would be a limited partner in the partnership. (Tr. 754.) She later had a telephone discussion with Mr. Inzunza in which Mr. Inzunza made it clear that a full-time commitment on her part, including the resignation from her present job, would be required if Marisol's application was granted. (Tr. 750.)

114. Ms. Holm knew that Mr. George Castro would be a limited partner in the venture before she decided to join the partnership. (Tr. 610.) Mr. Inzunza suggested to Ms. Holm the percentage of equity ownership in the project that she ultimately accepted in 1983. Ms. Holm did not review the limited partnership agreement with the other members of the group, but reviewed it in what she characterized as "one on one type meetings." In fact, she did not recall any meeting in which all the proposed partners sat down and discussed the various terms of the document. (Tr. 618-19.)

115. Between the A cut-off date and the B cut-off date, Mr. Inzunza approached Ms. Elizabeth Chavez and suggested that she become a partner in Marisol. (Tr. 855.) Ms. Chavez knew Mr. Inzunza from social gatherings that they both had attended in 1983. (Tr. 856.) Ms. Chavez spoke to Mr. Thomas Castro concerning the radio business before deciding to become a partner of Marisol. (Tr. 863.) Ms. Sewell recommended that Ms. Diana Padilla Brimberry be approached and offered the chance to become a member of the partnership and between the A cut-off date and the B cut-off date, Ms. Sewell and Ms. Chavez contacted Ms. Brimberry about joining the partnership. (Tr. 622, 774.) Marisol's agreement does not specify the voting rights of the general partners. (Future Cross Exhs. 1, 2.) Mr. Inzunza testified that the partnership operates on a one partner-one vote basis and that general partnership percentages were designed to allocate liability between the general partners vis-a-vis each other. (Tr. 508, 568.) The liabilities referred to are those in excess of the agreed capital contributions of the partners in the partnership. (Tr. 574.) Ms. Sewell agreed that she would be a general and a limited partner only after it was determined that new general partners would join the partnership prior to the B cut-off date. (Tr. 775.) The group considered that a structure whereby general partners were also limited partners was the best way to put together the "best package." (Tr. 777-778.)

116. The partnership agreement, which was drafted by Mr. Zevnik, does in fact provide for the participation of limited partners in partnership affairs. While the agreement provides that "[t]he General Partners shall be solely responsible for the management of the partnership business. . . .," it also requires limited partners to contribute "engineering reports and exhibits and other materials" to the partnership and it empowers the limited partners to appoint one limited partner to vote to break a deadlock among the partners. (Future Cross Exh. 3 at 5, 7.) Also, the agreement provides that a majority in interest of the limited partners must consent to, *inter alia*, the sale or assignment of a general partner's interest or the with-

drawal or substitution of a general partner. (*Id.* at 7-8.) There are other examples of a purposeful allocation of attributes of control to limited partners. For example under Section 7.4, the limited partners must unanimously consent to the issuance of additional limited partnership interests. (*Id.* at 14.) Under Section 8.5, a majority in interest of the limited partners may remove a general partner "for willful misconduct or gross neglect," subject to an opinion of FCC Counsel. (*Id.* at 17.) And Section 9.1 indicates that limited partners are entitled to vote their interests on amendments to the partnership agreement. (*Id. at 17.)*

117. Mr. Inzunza had wanted to form the entire group by May 12, 1983, but he didn't have time to put together something that he "was 100 percent happy with." (Tr. 471-72.) Certain individuals, including Louis Nogales, Alex Nogales, and Sylvia Morales, were contacted about becoming partners and Mr. Inzunza discussed these individuals with Mr. Thomas Castro. (Tr. 598-99.) In March 1984, Mr. Thomas Castro met with Ms. Chavez for lunch and they discussed her possible participation. (Tr. 863-64.) Shortly afterward, Mr. Inzunza spoke at a meeting attended by the original Marisol partners, Ms. Chavez, and Ms. Marta Caldera, a friend of Mr. Thomas Castro's who was also being considered as a possible new partner. (Tr. 867-68.) Mr. George Castro flew in from New York to attend that meeting. (Tr. 790.) Since then, Mr. Inzunza has continued to have discussions with Mr. Thomas Castro about Marisol's application. (Tr. 600.)

118. As a result of Marisol's restructuring, the two new partners, Ms. Chavez and Ms. Brimberry, acquired 20% and 29% of the general partner interests, respectively, and Ms. Holm's share of the general partner interests increased from 14.30% to 31%. (Future Cross Exh. 3.) Correspondingly, the general partnership interest held by the other two general partners, Mr. Inzunza and Ms. Sewell, were reduced from 42.85% to 2% ald.) While a total of 65.7% of the general partners' interests changed hands, it is noted as a matter of fact that Section 7.5 of Marisol's limited partnership agreement, entitled "Absolute Restrictions," prohibits the transfer of 49% or more of the general partnership interests prior to the "B" cut-off date, and prohibits any transfer of general partnership interests after the "B" cutoff. (Future Cross Exh. 1 at 15.)

119. According to Marisol's partnership agreement, while the general partners make decisions by majority vote, deadlocks are to be broken by the limited partners. (Future Cross Exh. 1 at 7.) The partnership has never held a formal vote (Tr. 835, 969) and partnership decisions, thus far, have always been unanimous, or were reached by consensus (Tr. 727-28, 835, 969). Ms. Holm testified, for example (Tr. 728):

> Our system has primarily been one of primarily meeting, discussing, negotiating, and reaching final agreement *amongst all partners*. (Emphasis added.)

Some of Marisol's principals have an understanding that they would vote based on their percentages of the general partnership interests in order to decide important or controversial matters (Tr. 508, 1060, 1062) or to break a dead- lock among the general partners. (Tr. 506.) But this understanding is not reflected in the partnership agreement. (Tr. 507.) One general partner, Ms. Brimberry, testified that she wanted to hold most of her equity as a general partner in order to have a significant role in decision-making (Tr. 1046) and a greater say in the partnership's affairs. (Tr. 1050, 1109.)

120. From May 1983, when the partnership was formed, until November 15, 1984, none of the partners contributed any capital to Marisol, except for the sum of $325.00 which was paid in by various partners (or by Mr. Inzunza alone) (Tr. 796) in order to open a partnership bank account. (Tr. 535-36.) From May 1983 until November 15, 1987, Marisol did not pay any of its expenses. (Tr. 536.) The engineer's bill for Marisol's 1983 application remained unpaid until after the first capital call was issued in November 1984. From November 1984 up to the time of their cross-examination in Mid- 1986, Marisol's principals contributed less than $20,000.00. (Tr. 575.)

121. Mr. Inzunza has responsibility for "handling most of the legal and financial kind of matters" for Marisol. (Tr. 796.) At one point, the group agreed on a schedule for monthly capital contributions, but that schedule was soon abandoned. (Tr. 734-5.) Instead, Mr. Inzunza has the responsibility to determine when capital contributions are needed. (Tr. 808.)

122. Marisol held only one partnership meeting between May 1983 and March 1984. (Tr. 771.) Between three and five meetings were held in 1985 and one or two meetings were held during the five-month period January 1 - May 31, 1986. (Tr. 832-34, 1094-95.) The responsibility for taking minutes were alternated between Mr. Inzunza and Ms. Holm and there was no person designated in writing for the duty. Formal minutes have not been taken at all of Marisol's partnership meetings. (Tr. 724, 728-29, 592.)

*Integration of Ownership Into Management*

123. *Fernando Inzunza.* Mr. Inzunza received a law degree from Stanford Law School in 1978. After graduation, Mr. Inzunza worked as an attorney in foreign investment regulation with the firm of Baker & MacKenzie. He began in the firm's Chicago office and he moved almost immediately to its office in Caracus, Venezuela. Mr. Inzunza subsequently left Baker & MacKenzie for a career in international commercial banking with Standard Chartered Bank Group Ltd. of Los Angeles and later with First Interstate Bank. He subsequently became the acquisition coordinator for a merchant bank in London. Since February of 1985, he has been an investment manager for the Caldera family in Los Angeles. Mr. Inzunza proposes to integrate himself on a full- time basis into the management of the proposed station as a Business Manager and Director of Sales and Marketing. His proposed duties include supervision of all sales personnel and supervision of station billings. He will also establish marketing plans, sales strategies, and pricing policies for the station and supervise accounting, billing and logging of data pertaining to advertising time sales. He will also employ and direct outside contractors. (Marisol Exh. 5, pp. 1-2.)

124. Mr. Inzunza is a Hispanic male. Mr. Inzunza currently resides at 4141 Via Marisol, Los Angeles, California. He has resided in Los Angeles since 1963, with the exception of a period from 1970 to 1979 when Mr. Inzunza attended secondary and graduate school and worked in Chicago and in Caracas, Venezuela, and during the period of October 2, 1984 to February 10, 1985, when Mr. Inzunza resided in London, England. (Tr. 459-461.)

125. Mr. Inzunza has been acting in civic activities in the Los Angeles area. He was the Los Angeles chapter president in 1984 of the Stanford Business School Alumni Association. He was the vice president from 1983 to 1984 and the events director from 1981 to 1983, and a member from 1980 to the present. From 1980 to the present, Mr. Inzunza has been a member of the Los Angeles Central City Committee of the Yale Club of Southern California. In 1984, Mr. Inzunza was the treasurer of Operation Neighbor, a Los Angeles based nonprofit organization supporting an orphanage in Tijuana; Mexico. Mr. Inzunza has no prior broadcast experience. (Marisol Exh. 5.)

126. *Diana Padilla Brimberry*. Ms. Brimberry is proposed to be integrated into the station's operations on a full-time basis as the General Manager and Director of Programming. Ms. Brimberry's proposed duties include the exercise of supervisory authority over the directors of the various departments of the station, including the news, sports and public affairs departments, programming department, engineering department, sales and business department, human resources department, and community relations department. Ms. Brimberry will review and critique the overall operation of the station and will participate in preparing the station's annual budget and capital expenditures. As director of programming, Ms. Brimberry will be responsible for supervising the overall content and for scheduling the station's programming. (Marisol Exh. 3.) Ms. Brimberry is a Hispanic female. She moved to Los Angeles in 1958 and from 1958 to 1976, she has resided in the Los Angeles area. (Tr. 991.) In 1976, Mr. Brimberry moved to Arcadia, California, a suburb of Los Angeles. (Tr. 990). In 1980, Ms. Brimberry moved to Bunker Hill Towers in downtown Los Angeles. (Tr. 989.) In 1982, Ms. Brimberry moved to Sierra Madre, California, a suburb of Los Angeles which is adjacent to Pasadena, and is approximately 20-25 minutes driving distance from downtown Los Angeles. (Tr. 987.) In August 0f 1984, Ms. Brimberry moved to Villa Highlands in Pasadena, California. (Tr. 986-7.) Ms. Brimberry and her husband leased a residence for one year and the lease terminated on August 7, 1985. (Marisol Exh. 8.)

127. In August of 1984, Ms. Brimberry purchased a residence in Diamond Bar, California. (Marisol Exh. 8.) In August of 1985, Ms. Brimberry and her husband purchased a residence in Oakhurst, California. (*Id.*) Diamond Bar is approximately a 20-25 minute drive from Los Angeles proper. (Tr. 985.) Oakhurst is approximately a 5 to 5 1/2 hour drive from Los Angeles proper. (Tr. 992.)

128. During the summer months of 1985, Ms. Brimberry divided her time equally between the Diamond Bar home and the Oakhurst home. (Tr. 1013.) Between August 30, 1985, and September 12, 1985, Ms. Brimberry registered her two non-college aged children for school in Oakhurst, California. (Tr. 995, 1007.) Ms. Brimberry does not believe that Oakhurst is within the service area of KRTH-FM. (Tr. 1021.)

129. Ms. Brimberry was a founding member in 1977 of the National Association of Latino Elected Officials. In 1978, Ms. Brimberry served on the Media Advisory Board of the City of Hope Medical Center. In 1978 and again in the period of 1979-80, Ms. Brimberry was appointed to serve on the Advisory Committee on Hispanic Affairs to Secretary of State Cyrus Vance and Secretary of State Edmund Muskie. In 1978, Ms. Brimberry was granted the Outstanding Woman In Media Award by the Mexican American Opportunity Foundation. From 1979 to the present, Ms. Brimberry has served as a volunteer instructor for writing and production in media workshops, and has offered career counseling to young persons seeking exposure to the media. At unspecified times, Ms. Brimberry has donated services to smaller community groups as mistress of ceremonies or as a guest speaker on women's issues. For example, she served on the California Commission on the Status of Women and she was a panel speaker on Hispanic affairs for B'nai B'rith/Jewish Defense League. (Marisol Exh. 3.)

130. Ms. Brimberry has considerable experience as an on-air personality. From 1974 to 1976, she was the producer or director of a number of programs including three weekly series. In 1974, Ms. Brimberry hosted Bienvenidos, a one half-hour interview program aired on KNXT(TV). In 1975, Ms. Brimberry was the host of the program "Steps to Learning" aired on KNXT(TV). From 1975 to 1977, Ms. Brimberry served as the co-host of "It Takes All Kinds," a weekly local public affairs program of one hour in duration aired on KNXT(TV). From 1976 to 1977, Ms. Brimberry was an associate producer and writer for "It Takes All Kinds." From 1976 to 1977, Ms. Brimberry was the producer and writer, in Spanish and English, for KNXT(TV)'s voter registration drive. In 1977, Ms. Brimberry appeared as an actress on the television show "Police Woman." In 1977, Ms. Brimberry was a panelist/interviewer for a news conference on the subject of the special educational integration program aired on KNBC(TV). In 1977, Ms. Brimberry was a field reporter for the early morning report insert on the "Today Show" aired on KNBC(TV). In 1978, Ms. Brimberry hosted and translated four half- hour specials on busing aired on KLCS(TV) and KMEX(TV). In 1978, Ms. Brimberry hosted a live, half-hour, three days weekly, syndicated show named "Summerfaire," which was designed to serve as a summer school on the air. The show aired on Station KCET(TV). In 1978, Ms. Brimberry hosted twelve half-hour film documentary programs on non-traditional jobs for women and men which aired on Station KLCS(TV). Ms. Brimberry's broadcast employment experience includes serving as the manager of community broadcast services for KNXT(TV) from 1976 to 1977. As part of her duties, Ms. Brimberry evaluated community attitudes, concerns and trends, made recommendations concerning programming to better meet the needs of various communities, prepared license renewal documents, annual and programming reports, and scheduled and conducted community ascertainments outside and within the station. From 1978 to 1980, Ms. Brimberry served as the director of community broadcast relations, reporting directly to the station manager and handling all aspects of the relationship between the community and the television station, for KNXT(TV). (Marisol Exh. 3.)

131. *Chris Equihau-Holm*. Ms. Holm proposes to integrate on a full- time basis into the management as an Assistant General Manager and Director of Human Resources. As assistant general manager, she will assist the general manager with her day-to-day operations and decisions regarding the station and she will work on special projects as the general manager sees fit. As director of human resources, she will supervise employment, compensation, benefits and record retention, and she will coordinate the station's EEO and affirmative action programs. (Marisol Exh. 4.)

132. Ms. Holm is a Hispanic female. She currently lives in Los Angeles and has lived there since 1976. From 1982 to 1985, she was a member of the board of directors of the YWCA of Los Angeles and she served on its personnel committee. From 1982 to 1983, she was on the dinner committee of the Mexican American Legal Defense and Education Fund. In 1981, she established the first annual Career Planning Conference for Hispanic College Students, and in 1982, she chaired the Conference. She has been the chairperson for membership of PMAA, and she has been involved in an unspecified manner in the Hispanic Academy of Media Arts and Sciences (HAMAS), California Association of Latinos in Broadcasting (CALIB) and the California Chicano News Media Association (CCNMA). (Marisol Exh. 4.)

133. At an unspecified time and in an unspecified location, Ms. Holm was the Manager of Employment and Employee Relations for Golden West Broadcasters. In that position, she was responsible for human resources policies and procedures for eight radio stations, two subscription television companies, and a local Los Angeles television station. (Marisol Exh. 4.)

134. *Sandra Serrano Sewell.* Ms. Sewell proposes integration into operations on a full-time basis as a Director of Public Services and Community Relations. In that position, Ms. Sewell's duties will include maintaining contacts with community organizations, ascertaining and monitoring the issues which are important to the community and to minority interest groups, and proposing responsive programming. She also proposes to perform a public relations function by responding to public comments on programming. (Marisol Exh. 6.)

135. Sandra Serrano Sewell is an Hispanic female. From 1968 to the present, she has lived in Pasadena, California, which is adjacent to the city of Los Angeles and within the service area of KRTH-FM. (Marisol Exh. 6.)

136. From 1970 to the present, Ms. Sewell has been a board member and past president of the Comision Feminil Mexicana Nacional Latila. From 1980 to the present, she has been a board member of the Hispanic Child Development Council. From 1980 to the present, she has been active in the Hispanic Leadership Corporation of Los Angeles. From 1980 to the present, she has served as president of the Pasadena chapter of Comision Feminil. From 1983 to the present, she has been a board member of the Los Angeles Children's Museum. From 1984 to the present, she has been Commissioner of the Los Angeles County Children's Services Commission. From 1984 to the present, she has been a board member of New Economics For Women, an economic development program. Ms Sewell has no prior broadcasting experience. (Marisol Exh. 6.)

137. *Elizabeth Chavez.* Ms. Chavez proposes integration into the management of the proposed station on a full-time basis as the Director of News, Sports and Public Affairs Programming. Her proposed duties include coordination with Ms. Brimberry in determining the types, mix, sources and timing of programming to be aired, supervision of the station's news, sports and public affairs department, and supervision of production of programming responsive to the needs of the community. She will also coordinate with Mr. Inzunza to develop market studies to determine the commercial viability of certain types of programming and she will make recommendations concerning programming to the director of programming and the general manager. (Marisol Exh. 7.)

138. Ms. Chavez is an Hispanic female. She has resided in Los Angeles since 1977. From 1979 to the present she was the committee chair for the California Association of Latins in Broadcasting. From 1979 to the present she was the committee chair for the Chicano News Media Association. From 1982 to 1984, she was president of the Hispanic Women's Council. (Marisol Exh. 7.)

139. Ms. Chavez has worked for KCBS(TV) of Los Angeles, California. At unspecified times, she has served as producer of "Two On The Town," a nightly magazine show airing Monday through Saturday at 7:30 P.M. She has also served as an associate producer for the show. She has been employed as an associated producer for "Sunnyside," a daily, morning, half-hour public affairs program airing Monday through Friday. She has been an associate producer for "Interface," a half-hour debate show that airs on the weekends. She has been associate producer for "Two With You," a program with an unspecified air time and airing with unspecified frequencies. She has been an associate producer for "Juntos," a program airing once every three weeks, which is an instructional bilingual public affairs program designed primarily for the Los Angeles adult Spanish speaking population who have marginal skills in English. She has been an associate producer for "It Takes All Kinds," a weekly, half-hour public affairs program featuring people of interest in southern California. Ms. Chavez was a producer for "The Sixteenth Of September," a prime time special in 1983 and 1984. (Marisol Exh. 7.)

140. Ms. Chavez has been an associate producer for "Fernando," a half-hour, prime time special featuring Dodger baseball pitcher Fernando Valenzuela. The show aired on May 28, 1981. Ms. Chavez was an associate producer for "Nobody's Talking," a prime time special focusing on teenage sexuality which aired June, 1980. Ms. Chavez was an associate producer for "A Celebration of Independence," a one hour prime time special commemorating Mexican Independence Day. Ms. Chavez was an associate producer for "Talk About Special Edition," a half-hour public affairs discussion program. Ms. Chavez was a consultant and translator for "Reach Out," a monthly translation of public service announcement. She was also a consultant for "Project Parenting," a series of one hour prime time specials dedicated to the International Year of the Child. (Marisol Exh. 7.)

***Radio Radio, Inc.***

***The Applicant***

141. Radio is a California corporation authorized to issue two million shares of stock, all of one class and designated as "common stock." (Radio Exh. 1.) The shares of the corporation may be issued from time to time in two series: Series A, of which Radio is authorized to issue one million shares, and Series B, of which Radio is authorized to issue one million shares. (*Id.*) The rights, preferences, privileges and restrictions of Series A and Series B shares are equal and identical in all respects except for voting rights. The holders of shares of Series A have the exclusive voting rights. The holders of Series B shares are not entitled to vote. (Radio Exh. 1; Stipulation at Tr. 4280.)

142. There have been issued one thousand Series A common shares, and one thousand Series B common shares. (Radio Exh. 1.) Valerie Q.E. Woodson is the president, CEO, a director of, and the holder of all one thousand shares of Series A common stock issued in Radio.

(*Id.*) Henry Cornell is the secretary, a director and holder of all one thousand shares of Series B common stock issued. (*Id.*) These shares were issued in June or July 1985, about three months after the date for the exchange of integration proposals. (Tr. 2367., *See Memorandum Opinion And Order*, FCC 85M-900, released March 4, 1985 (integration proposals to be exchanged on March 22, 1985).

143. Radio is an "informal" corporation. (Tr. 2502.) None of the ordinary corporate forms have been observed. (Tr. 2500-2502.) For example, Radio has not adopted corporate resolutions approving the issuance of stock, setting the amount of money to be paid for stock, or authorizing the corporation to borrow money from stockholders. (Tr. 2373; 2456-2458; 2500- 2502.) When additional funds are needed, the corporation makes no formal assessments. (Tr. 2503.) When money is needed, Ms. Woodson requests money from Mr. Cornell. (Tr. 2503.)

144. Although Mr. Cornell holds only Class B nonvoting stock, he has taken and continues to take an active role in Radio's business affairs. He is the secretary of the corporation and a director. (Radio Exh. 1.) He is required to co-sign checks drawn on the Radio account in excess of $1,000. (Tr. 5906.) The purpose of this requirement is to enable him to control the expenditure of money made on Radio's behalf. (Tr. 5906.) Mr. Cornell also had sole responsibility for obtaining a commitment from a financial entity to loan Radio the money needed to construct and operate its proposed station for three months without revenue. (Tr. 5807.) Mr. Cornell would decide the profit-sharing terms which Radio would offer to prospective lenders. (Tr. 4586.)

*Integration of Ownership Into Management*

145. Ms. Valerie Woodson is a black female. Prior to October 1974, she lived in New York City. From October 1974 until August 1986, she resided in Los Angeles within the service area of Radio's proposed station. In August 1986, Ms. Woodson accepted employment in New York. *See Order*, FCC 84M-1184, released August 19, 1984 (Presiding Judge's ruling granting Radio's Petition for Leave to Amend reflecting her New York employment).

146. Since 1981, Ms. Woodson has been a volunteer and member of the Adversiting Industry Emergency Relief Fund. Since 1982, she has been chairperson of the Fundraising and Membership Committee, and a member of the Executive Board of the Southern California Media Network Association. During 1983, Ms. Woodson was a public relations and advertising volunteer to the Organization to Save the Santa Monica Pier during its initial fundraising drive. Ms. Woodson regularly donates time for advertising and public relations work in support of the United Negro College Fund annual fundraising drive. Ms. Woodson is a longstanding member of the NAACP, having been active in both the Westchester and Hollywood Chapters, and she is a member of the Urban League (Radio Exh. 2 at 3.)

147. In April 1975, Ms. Woodson became a sales assistant at the CBS owned-and-operated Los Angeles television station KNXT-TV. In October 1975, she took a position as a newscaster and announcer for Los Angeles radio station KRLA-AM, following which, in September 1976, she joined Storer Broadcasting's KTNQ-AM and KGBS-FM Los Angeles stations as promotion director. At Storer, she directly supervised the marketing and promotions department staff and was responsible for the execution of on-air promotions, the design and preparation of station sales presentation materials, and the station's marketing and public relations campaigns. In this capacity, Ms. Woodson was also responsible for community ascertainment on behalf of the station. (Radio Exh. 2 at 2.)

*Credibility Findings*

148. Ms. Woodson did not have possession of her shares of stock when she testified because at that time they were being held by Ventech, a consulting firm for Radio. (Tr. 2368.) As noted by RKO, Ms. Woodson had testified initially that she had the stock certificate in her possession. (Tr. 2366.) *See* RKO PFC at 15 n. 11. But on review of that entire segment of her testimony, it is not concluded that she was being untruthful or lacked candor in testifying that she was in possession of the stock certificate. She admitted a few questions later that Mr. Spires of Ventech actually had possession of her certificate and the question evoking the erroneous answer had framed the facts calling for a yes or no:

Q. Do you have in your possession stock certificates representing shares of Radio, Inc.

A. Yes, I do.

(Tr. 2366-68.) Thus, Ms. Woodson did not volunteer the erroneous information.

149. Ms. Woodson also testified inconsistently about the principals' contributions to the venture. At her deposition, Ms. Woodson testified that no fixed price had been set for their shares, but the two principals had agreed to share the expenses of the prosecution of Radio's application. (Tr. 2449; *compare* 2347-2348.) Ms. Woodson also testified at her deposition that she owned 1,000,000 shares of the Series A stock, the entire amount authorized by the Articles of Incorporation. (Tr. 2467.) At the Phase I hearing, Ms. Woodson testified that she could not recall when Radio had decided to issue each shareholder 1,000 shares (Tr. 2467), although she testified that she and Mr. Cornell had decided at their initial meeting in March 1983 to pay $1,000 "toward their shares" (Tr. 2350). She testified that their contributions toward their shares were made during 1983 and that they were deposited into Radio's bank account. (Tr. 2364, 2447.) She further testified that she made her initial contribution in "two sums" and that Mr. Cornell made his in a single "lump sum." (Tr. 2366.)

150. During the Phase II hearing, Radio's bank statements were shown to demonstrate that Ms. Woodson had deposited only $400 in that account (RKO Cross Exh. 22) and that during 1983, Mr. Cornell had contributed $1,350 in two checks. Although Ms. Woodson conceded that she had not paid $1,000 to Radio's account as she had previously testified, she persisted that the checks and money orders which she had testified had been deposited in the account were, in fact, cashed and the money was paid to Ventech to Pay Radio's expenses. Ms. Woodson testified that her contribution to Radio totalled in the area of $2,000: $1,000 as a contribution to capital and the rest as a loan to the corporation for the prosecution of the application. (Tr. 2370- 2371.) Mr. Cornell contributed approximately $5,000: $1,000 toward his stock and an additional $4,000, all of which is a loan to the corporation and $1,500 of which he had advanced on behalf of Ms. Woodson, who has made no further payment to defray the

expenses of the corporation. (Tr. 2371.) According to Ms. Woodson, the $1,500 paid on her behalf is a loan to her. (Tr. 2371.) No written document evidences the alleged loan which bears no interest. Also, the loan is supported by no collateral and has no specific due date. (Tr. 2371-73.) Ms. Woodson has no financial obligation to Radio after it receives a grant. She has no obligation to contribute any money to Radio other than her obligation to "loan" Radio an amount equal to one-half of its expenses for prosecuting the application. (Tr. 2380; 2456.)

151. These facts, which are accurately recounted in RKO's filing (RKO PFC at 15-16), do not support findings of misrepresentation or lack of candor on Ms. Woodson's part insofar as her testimony is concerned. (The consideration of this evidence in connection with the added issues against Radio on its financial certification is another matter which is addressed elsewhere. *See* Paras. 164 to 171.) For purposes of credibility findings, however, it is accepted as fact that there is a discrepancy between Ms. Woodson's deposition testimony where she asserted that there was no share price established and her later testimony at the hearing on May 29, 1986, when she testified that she and Mr. Cornell had agreed to set the price at $1.00 per share. There also were inconsistencies in amounts of deposits testified to. The demeanor of Ms. Woodson was observed. She did not give the appearance of an untruthful person and her answers were not evasive. Her answers merely indicated that she was relying on Mr. Cornell for handling the corporate capitalization of Radio's venture, circumstances which reflect adversely on Radio's integration and which eliminate Radio as a contender. But the evidence does not support findings of untruthfulness on Ms. Woodson's part.

## ADDED ISSUES ON BASIC QUALIFICATIONS

### Valley's Financial Qualification and Financial Certification Issues

152. Mr. Cabranes is Valley's sole general partner. He prepared Valley's application with the help of counsel and he filed it in May 1983. (Tr. 6145-6.) Mr. Cabranes certified that Valley was financially qualified to construct and operate the proposed facilities. (Tr. 6134.) But he did not prepare a written budget for the L.A. stations prior to filing Valley's application. Instead, he used a written budget which he had prepared in connection with his application for a new unrelated AM station at Simi Valley, California. (Tr. 6191-7.) The significance of the Simi Valley application is explained below.

153. In 1980, Mr. Cabranes prepared and filed the Simi Valley application. (Tr. 6550.) As an integral part of that application which was filed on the 1977 version of FCC Form 301, Mr. Cabranes submitted a financial showing which included itemized costs and financial sources. (Tr. 6551-3.) Mr. Cabranes realized that he needed a formal written leasing proposal in connection with his Simi Valley application. (Tr. 6555.) Mr. Cabranes obtained a loan committment from Banco Popular in the amount of $125,000, which loan was to be made in connection with the construction and operation of the Simi Valley station. (Marisol Cross Exh. 3, Tr. 6313-6.) In the Simi Valley proceeding, a financial issue was added against Mr. Cabranes which was favorably resolved. *See Memorandum Opinion and Order*, FCC 83M-884, released March 17, 1983. (Valley Exh. 10.) Mr. Cabranes demonstrated to the satisfaction of the presiding judge in that case that costs to construct and operate the Simi Valley station would be $88,703. In order to meet those costs Mr. Cabranes represented having net liquid assets of $91,000 and a bank letter from the Banco Popular in the amount of $125,000. (Valley Exh. 10.)

154. When Mr. Cabranes certified Valley's financial qualifications in 1983 in this case he based the financial qualification on the budget that he had prepared for Simi Valley as modified to account for two Los Angeles stations and Valley relied on the funds he had available to construct and operate the Simi Valley station. (Tr. 6134-43.) The process went as follows. Mr. Cabranes started with $88,703 as the amount estimated for construction and operation of the Simi Valley station. (Tr. 6136, 6197.) To that amount he added the cost of a 5 kw transmitter for Los Angeles as opposed to a 1 kw transmitter at Simi Valley (Tr. 6143). When pressed, Mr. Cabranes quantified this amount at between $10,000 to $15,000. (Tr. 6217.) Mr. Cabranes also calculated the additional costs for the Los Angeles FM equipment at $60,000. (Tr. 6143.) Mr. Cabranes obtained no written equipment proposals prior to filing Valley's applications other than the Simi Valley proposal. (Tr. 6290, 6192-4.) Mr. Cabranes said that in 1983, Valley planned to buy the FM equipment and to lease the AM equipment. (Tr. 6213.)

155. Mr. Cabranes calculated that Simi Valley's leasing costs (towers and land) would approximately equal the cost for leasing towers and land for the Los Angeles AM station. This conclusion was based on his belief that the Simi Valley station required three towers of a taller height than the two towers needed for Los Angeles. The Simi Valley towers also required a greater land area than Los Angeles. Finally, Mr. Cabranes believed that the land costs in Simi Valley were increasing while the land where RKO's AM towers were located on Venice Boulevard in Los Angeles was a depressed area and costs were reduced as a result. (Tr. 6143-5, 6203-4, 6215-6.) Although Mr. Cabranes made no attempt to determine actual cost to lease the RKO AM site he assumed it would be the same or less than the sum of $2,550 which he had budgeted for three months at the Simi Valley AM site. (Tr. 6202-11.)

156. Mr. Cabranes proposed to use the RKO broadcasting studios, although in 1983, he was not sure where the studios were located. (Tr. 6200- 2.) Alternatively, he contended that the sum of $6,584 which he had budgeted for in connection with Simi Valley to cover miscellaneous construction costs would have been sufficient to cover the costs of constructing studios for Los Angeles. (Tr. 6291-6.) The miscellaneous construction costs for Simi Valley also covered the cost of acquiring a field intensity meter, auxiliary power generator and remote pickup base/mobile system equipment. (Valley Exh. 10.) In 1986, the cost of the auxiliary power generator equipment alone was $29,324. (Tr. 6368.) Moreover, the Harris proposal for FM equipment in 1986 was $124,000 compared to Cabranes' 1983 estimate of $60,000. Mr. Cabranes attributed the difference to inflation and to the inclusion in the Harris estimate of items that were recommended but were not required. (Tr. 6407-9.)

157. Valley prepared no written documents to support its 1983 budgeting. (Tr. 6193.) Based on the foregoing evidence and the testimony, it is found that there was no written budget prepared for the Los Angeles stations until after August 11, 1986, when the financial issue was added against Valley. (Tr. 6180-8.)

158. When Mr. Cabranes certified Valley's financial qualifications in 1983, he was relying on his own personal funds and the Banco Popular loan commitment. Those funds, in the amount of $216,000, are found to have been available for the construction and operation of the Simi Valley station and for no other purpose. (Tr. 6134-5.) The Banco Popular letter specifically stated that it was for the purpose of constructing and operating the Simi Valley station. (Marisol Cross Exh. 3, Tr. 6137-6.) Mr. Cabranes' belief that he had $216,000 to do with as he saw fit in 1983 is unreasonable. Mr. Cabranes cannot recall having such discussions with Banco Popular and he had no basis for believing that Banco Popular would have made available whatever money was necessary for the Los Angeles stations (Tr. 6321-4.) Mr. Cabranes probably would use his personal assets for construction of the Los Angeles stations. (Tr. 6325.) But those funds are not sufficient to construct and operate.

159. In April, 1983, Valley received a construction permit for the Simi Valley AM station which did not go on the air until October 1984. (Tr. 6327.) Mr. Cabranes thought that he could sell the Simi Valley construction permit to finance the construction of the Los Angeles. He also thought that by selling the Simi Valley construction permit he would be able to recoup Valley's expenses incurred in construction. But these thoughts were entirely speculative and no potential purchasers were identified. Certainly he had no understanding or agreements with the entities that had loaned money to Valley that these funds could be used for the Los Angeles stations. (Tr. 6153, 6326, 6350-2, 6561, 6564.)

160. Valley's budget is set forth on page 1 of Valley Exh. 6 and it is Valley's only budget. (Tr. 6180.) During Mr. Cabranes' testimony errors in this budget were established. Rent for the FM station tower should be $16,500 instead of $5,500 (Tr. 6369); the total cost for auxiliary power equipment should be $29,324 instead of $28,000 (Tr. 6368); and the "Tel. Co." charge for the FM station should be $1,356 instead of $452. (Tr. 6372.) Inclusion of these revised costs bring Valley's operating costs for three months to $64,456. (Tr. 6372.) Mr. Cabranes did not include costs for construction or remodeling of a studio, nor costs for installation of equipment, nor costs for furniture, fixtures and office equipment. (Tr. 6379, 6565-6.) In June 1986, Valley's total liabilities ranged from $650,000 to $700,000. (Tr. 6424.) Therefore, the budget relied on by Valley is found to be insufficient to meet its proposal to construct and operate in Los Angeles.

161. Mr. Cabranes contended that the estimated cost for three months of staffing at $35,200 was accurate. (Tr. 6370.) But upon examination the staffing proposal is found to be in a state of flux. Mr. Cabranes originally testified that he would have ten full-time on the air people: one person for traffic and billing, one person for public service, one part-time secretary and part-time bookkeeper and an engineer on call for a total of 12 1/2 people. (Tr. 6309-11.) He later stated he would have ten full-time air people, five part-time air people and six office people. (Tr. 6524.) Then Mr. Cabranes testified that he would have ten full-time air people, ten part-time air people, two part-time office people, four full-time office people and a full- time engineer. (Tr. 6525.) At Simi Valley, it is sometimes necessary to pay a guaranteed salary to new sales people. (Tr. 6538.) A reasonable salary for an on air person would be $1,200 to $1,500 per month (Tr. 6527) which would mean a monthly payroll for those persons ranging from $120,000 to $150,000.

162. In July 1986, around the time that the petition to enlarge issues was filed against Valley, Mr. Cabranes decided to purchase the RKO land and towers rather than to seek a lease arrangement. (Tr. 6566.) But Valley did not even contact RKO to determine the land value. Nor did Valley use a real estate broker or appraiser to determine the land value. (Tr. 6548.) Mr. Cabranes merely went to the local county tax office and examined documents concerning taxes and assessed land value. (Tr. 6546.) He could not recall whether he had calculated the land value from the tax information. (Tr. 6547.) When shown Valley's August 22, 1986, amendment, Mr. Cabranes admitted that the explanation of how the land value had been calculated by him was contained in the amendment but had not been made a part of Valley's direct case. (Tr. 6558-9.) According to Mr. Cabranes' calculations, based upon property taxes levied at $29,885.76, the land value would be $2,988,576. (Tr. 6559-60.) Valley also sought to rely on a bank letter from the Security Pacific National Bank in the amount of $3,000,000 to cover its costs to construct and operate the Los Angeles stations. However, this letter was not received into evidence (Tr. 6119-23).[3]

163. Since Simi Valley's station KWNK went on the air in October 1984, it has received two Official Notices of Violation from the Federal Communications Commission. (Valley Exhs.11-14.) Valley has not been assessed any fines or forfeitures in connection with the Notices. (Tr. 6175.) However, a Notice of Apparent Liability in the amoung of $2,700 has been issued to Valley by the Commission which is being contested. *See Order*, FCC 87M-1087, released May 15, 1987.

Radio's Misrepresentation/Lack of Candor and False Certification Issues

164. On May 12, 1983, Ms. Valerie Queen Esther Woodson filed Radio's original application for a construction permit for station KRTH-FM, Los Angeles, California. Radio's only other principal is Mr. Henry Cornell. At that time, Ms. Woodson had not completed Section III of the application which is the section requiring an applicant to certify that it is financially qualified. In March 1984, Ms. Woodson filed an amendment to Radio's application. In the March amendment, she certified that Radio was financially qualified as certified to in the original application. Ms. Woodson also certified in the amendment that all the statements made therein were true and correct. (Future Cross Exhs. 13-14.)

165. During the course of Ms. Woodson's testimony, she testified that she had intentionally not completed the financial certification section of the application because she did not have sufficient financial information to check the box. *See Memorandum Opinion and Order*, FCC 86M-1189, released April 7, 1986, and Tr. 4542, 4557. Ms. Woodson explained that she did not feel that Mr. Cornell's loan commitments were firm enough for her to check the "yes" box in the financial section of the application. However, she did not believe that "no" was the appropriate answer either in view of Mr. Cornell's communications with people who he believed were committed to loaning Radio the funds. Ms. Woodson testified that in view of the foregoing, her attorney at the time (Mr. Spire) advised her not to complete the financial section. (Tr. 4496-4497, 4557.) According to Ms. Woodson, her attor-

ney advised her that it was standard practice not to complete the financial section and that she would have an opportunity to amend Radio's application so as to complete this section. (Tr. 4500.)

166. Ms. Woodson testified that in early April of 1983, shortly after her first meeting with Mr. Cornell, she had derived a cost estimate of $2 million for construction and operating costs and she furnished them to Mr. Cornell. (Tr. 4520.) Ms. Woodson said that she consulted with numerous people at Venture Technologies, Inc., in deriving this amount. (Tr. 4496- 4497, 4521-4523.) However, while Ms. Woodson testified that she had recorded all of her computations on a yellow pad, she could not produce any written document of her cost estimates. (Tr. 4525.) Ms. Woodson stated that once she had provided Mr. Cornell with the estimates Mr. Cornell was to locate the financing. (Tr. 4541.) Ms. Woodson believed that Mr. Cornell was solely responsible for obtaining the financing for Radio's proposal. (Tr. 4608.) Based upon this belief, Ms. Woodson did not seek to obtain financing on her own. Nor did she make any effort to familiarize herself with Mr. Cornell's sources. She testified that Mr. Cornell never indicated the basis for his belief that the financial sources he was relying upon could provide the needed funds. (Tr. 4598.) Mr. Cornell stated that he had obtained alternative commitments from a Mr. Sloneker and a Mr. Barry. Mr. Cornell also testified that he was aware that Ms. Woodson would be filing Radio's application without completing the financial section. (Tr. 5736.) Mr. Cornell stated that it was on the advice of Mr. Spire that he and Ms. Woodson decided not to complete the financial section in conjunction with filing the application. (Tr. 5737.)

167. Mr. Cornell testified that the alternative agreements between Mr. Sloneker and Radio are in the form of debt. He explained that there will be a fixed interest rate and a participation in Radio's cash flow and Mr. Cornell testified at some length as to how the interest rate will be determined. According to Mr. Cornell, all of the assets of Radio, including its license, would serve as collateral. (Tr. 5742-5747.) Mr. Cornell testified that the license was the key to the proposal's value. (Tr. 5890.) The duration of the loan was to be no longer than five years and it was agreed that Radio would have the right to make prepayment. This agreement was never reduced to writing. (Tr. 5742-5747.) Mr. Cornell described his relationship with Mr. Sloneker as one of friendship. (Tr. 5747-49.) But he conceded that he had never actually closed a deal with Mr. Sloneker. (Tr. 5936.) The basis for believing that Mr. Sloneker can provide the $2 million needed to cover the costs of Radio's proposal is Mr. Sloneker's representations to him. (Tr. 5750.) Mr. Cornell stated that Mr. Sloneker is a senior executive of a company which is predominantly family-owned (Tr. 5749) and that based upon Mr. Sloneker's holdings it is obvious that Mr. Sloneker can provide the financing. (Tr. 5750.) Mr. Cornell admitted that he has never obtained a financial statement from Mr. Sloneker. (Tr. 5879.)

168. During cross examination, Mr. Cornell backed away from part of his earlier testimony regarding Mr. Sloneker's financial wherewithal by conceding that Mr. Sloneker's assets amount to slightly more than $1 million. He also admitted that Mr. Sloneker will have to borrow funds in order to finance Radio's proposal but he did not know whether Mr. Sloneker has any firm commitments for a loan. (Tr. 5884.) Mr. Cornell conceded that the maximum amount that Mr. Sloneker would be able to borrow against his shares would be $800,000 and that aside from Mr. Sloneker's stock ownership, Mr. Cornell did not have any information regarding his finances. (Tr. 5886.)

169. With regard to the agreement made with Mr. Barry, Mr. Cornell testified that the terms of the deal were similar or the same. (Tr. 5752.) Mr. Cornell stated that Mr. Barry is a vice president with the Merrill Lynch securities brokerage firm. (Tr. 5752.) Mr. Cornell's basis for his belief that Mr. Barry can provide Radio with the necessary funds is nothing more than Mr. Barry's representations to him. Mr. Cornell admitted that he does not know how Mr. Barry is going to obtain $2 million dollars. (Tr. 5909.)

170. On March 29, 1984, Radio amended its application to provide its financial certification. Ms. Woodson testified that at that time she was able to certify as to Radio's financial qualifications because Mr. Cornell had obtained two alternative sources for the $2 million dollars which Radio needed. (Tr. 4578.) According to Ms. Woodson, prior to filing the amendment certifying that Radio was financially qualified she did not receive any new information regarding the committed sources. However, she asserted that Mr. Cornell had obtained alternative firm commitments. She based her change in attitude, between the time she filed Radio's application and the time she filed its March amendment, on having had "eye-to-eye" contact with Mr. Cornell during that time. (Tr. 4570.) In that regard, Ms. Woodson conceded that she knew no more about committed sources at the time that she filed the March amendment then she knew at the time that she filed Radio's original application, i.e., that "they were worth an awful lot of money." (Tr. 4579- 4580.) Ms. Woodson even contradicted her earlier testimony by stating that in March of 1984, prior to her filing Radio's March amendment, Mr. Cornell had identified one of the committed sources to her and indicated to her that this person had $15 million in the bank. (Tr. 4614.) Ms. Woodson further testified that her expectations were that funding would come either from the "committed sources" or from personal funds. (Tr. 4609.) However, Ms. Woodson's belief that these sources had sufficient personal funds was based solely on Mr. Cornell's representations. (Tr. 4581). It was Ms. Woodson's belief that the committed sources which Mr. Cornell was relying upon in March of 1984, were the same sources that he was relying on in May of 1983 and she did not want Mr. Cornell to do anything more in terms of obtaining committed sources. (Tr. 4566.) Ms. Woodson knew that the terms of the agreements with the committed sources were not written and it was not her understanding that financial commitments had to be reduced to writing. (Tr. 4587, 4641.) Mr. Cornell also testified that the loan commitments had never been reduced to writing. (Tr. 5876.)

171. Mr. Cornell testified that by the "A" cut-off date he was sure that he had obtained a commitment for $2 million. (Tr. 5738.) Yet Mr. Cornell testified that Ms. Woodson's decision not to complete the financial section of the application allowed him more time to probe the market and that between the "A" and "B" cut-off dates he had obtained two firm commitments. (Tr. 5739.) Contrary to Ms. Woodson's testimony that the alternative committed sources were an individual and a group, Mr. Cornell testified that there were two individuals, Mr. Sloneker and Mr. Barry. (Tr. 5742.) Moreover, Mr. Cornell testified that prior to filing the March 1984 amendment, he merely had

checked with these sources to make sure that he had two firm commitments. (Tr. 5739.) He then subsequently testified that in 1983, when the original application was filed, he only had a commitment from Mr. Barry and that he did not obtain the commitment from Mr. Sloneker until the period between the "A" and "B" cut-off dates. (Tr. 5925.)

## CONCLUSIONS OF LAW

172. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determining which applicant meets the statutory standard. *See Policy on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

173. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, *supra* at 603-07. Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and minority and female gender preference.

*Community Needs Issue*

174. The AM applicants propose three separate communities of license: Hawthorne (South Jersey), Beverly Hills (Cozzin) and Los Angeles (RKO, Future and Valley). If a preponderance of the evidence establishes that a choice of community can be made based on its demonstrated need for service, such choice must be made irrespective of the applicants' comparative qualifications. *F. C. C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

175. It is noted preliminarily that this is a license renewal case. RKO contends that it is entitled to a renewal expectancy and that therefore a Section 307(b) analysis would not be necessary. *See Pillar of Fire*, 2 F.C.C. Rcd 519, 520 (1987) (where record demonstrates that renewal applicant had met its public service obligations it was entitled to a renewal expectancy).[4] But in view of the *Initial Decision* in the KHJ-TV proceeding (87D-27) *supra* wherein the Presiding Judge found RKO to be unfit to hold a Commission broadcast license, no such expectancy is applicable here. Thus, a 307(b) analysis is required to be made. Also, since the community needs issue is raised only as to the AM proposals, its consideration in this adjudicatory proceeding does not negatively impact on Commission policy. *Compare* the precepts underlying the FM allocation scheme (pre-determined selection of preferred communities) and the AM allocation scheme (demand system where applicants may apply for a new station in any community where an available frequency can be found). *Pillar of Fire*, *supra*.

176. There is no difference in the reception service proposals of any of the applicants in this case since all have proposed to use RKO's facilities. All applicants will provide a reception service to more than 9 million people who are similarly well served by five or more aural services. (Findings at Para. 24.) Thus, considerations of reception service are irrelevant leaving transmission services as the applicable consideration for measuring community needs. (Findings at Para. 17, 23.)

177. South Jersey and Cozzin would provide first transmission services respectively to Hawthorne and Beverly Hills while Los Angeles already has multi-broadcast transmission facilities licensed to it. The comparative populations are: Hawthorne (56,447 pop.) and Beverly Hills (32,367 pop.) *See New Radio Corp.* v. *F. C. C.*, 804 F.2d 756 (D.C. Cir. 1986) (Community determinations are based on history, area and population, type of government, public services, economic growth, business establishments, educational, transportation, cultural and recreational facilities and civic organizations). First local services communities with the largest population are the logical winners when all other relevant factors are at equilibrium. *Id. See also Affinity Communications, Inc.*, 56 Radio Reg. 2d (P&F) 510 (Review Bd. 1984); and *Cornwall Broadcasting Corp.*, 89 F.C.C. 2d 704, 709-10 (Review Bd. 1982). Thus, Hawthorne would be preferred over Beverly Hills due to its greater population.

178. The Commission has held that "no Section 307(b) preference is warranted where an applicant specifies as its proposed community of license a suburban community that is integrally part of a large metropolitan area and seeks sufficient power to cover the large area." *Arizona Number One Radio, Inc.*, 61 Radio Reg. 2d (P&F) 1585, 1586 (1987). *See also Faye and Richard Tuck, Inc.*, 103 F.C.C. 2d 936 (Review Bd. 1986); *Hispanic Owners, Inc.*, 99 F.C.C. 2d 1180 (Review Bd. 1986); and *Miners Broadcasting Services, Inc.* v. *F. C. C.*, 349 F.2d 199, 201-202 (D.C. Cir. 1965). But RKO's facility operates as a Class III-A radio station on a regional channel and services Los Angeles and its metropolitan areas, including Hawthorne and Beverly Hills. In cases where a community preference is sought in the same metropolitan area, the Commission applies four factors:

(1) Power and class of station.

(2) Independence or interdependence of the specified "community" relative to the central city of the "urbanized area."

(3) Size of the specified "community" and its proximity to the "urbanized area."

(4) Signal population and relevant advertising market.

*Miners Broadcasting*, *supra* at 201-2 n. 6, applied by the Commission in *Debra D. Carrigan*, 100 F.C.C. 2d 721, 729 (Review Bd. 1985) and *Arizona Number One Radio, Inc.*, supra at 1587. These factors are applied below to the South Jersey and Cozzin proposals.

179. Each of the applicants proposes to continue to use the AM frequency 930 kHz presently assigned to RKO to provide a regional service. More specifically, each applicant proposes a daytime 0.5 mVm contour to service virtually all of the Los Angeles metropolitan population which includes all of Los Angeles County, most of Ventura County, all of Orange County and portions of Santa Barbara County, San Bernardino County, Riverside County and San Diego County. (Findings at Para. 27.) South Jersey and Cozzin concede that the relevant advertising market is the entire Los Angeles metropolitan region and these applicants will select program formats that are designed to serve the entire region. (Findings at Para. 17 and 23.) While South Jersey and Cozzin propose to transmit

from separate communities, the business end of the South Jersey and Cozzin proposals are no different from those of Future, Valley and RKO who propose to continue to transmit from Los Angeles. There has been no distinction established under Section 307(b) based on the power and class of the station or the targeted population and relevant advertising market. (*Id.*)

180. Other factors also reject a preference here. Hawthorne and Beverly Hills were not shown to be independent of Los Angeles. (Findings at Para. 25.) Their residents largely work elsewhere in the metropolitan area. Furthermore, on a comparative basis, Hawthorne and Beverly Hills are not largely populated and are geographically integrated with Los Angeles through the noted freeway system which laces the entire area. (Findings at Para. 28.) Thus, the proximity of these two communities to Los Angeles, their interdependence with Los Angeles in terms of job opportunities and cultural and sport recreational facilities, the identified regional broadcast channel at issue here, the identical coverage proposals, and the already well-served reception areas dictate the result that Section 307(b) has no relevance in this case. *Compare RKO General, Inc. (KFRC),* FCC 86D-49 (Chief Judge Fitzpatrick), released August 8, 1986 at 109-110 and cases cited therein. Rather, this issue is resolved under the *Huntington* doctrine recently applied by an appellate court, a doctrine which:

> recognizes that for proposals involving high-power frequencies where a suburban community is so closely integrated with a central city that it is a mere appendage of the urbanized area, it should not be considered a separate community for purposes of section 307(b).

*New Radio Corporation* v. *F. C. C.*, 804 F.2d 756, 759 (D.C. Cir. 1986). By virtue of the "demonstrated interdependence" of the Hawthorne and Beverly Hills communities with the metropolitan area of Los Angeles they are not separate communities for 307(b) purposes. *Id.* at 761. Here, the controlling circumstances for applying *Huntington* are the uniformity of the AM proposals to use the existing RKO frequency, the population proposed to be served is just under 10 million people in an area of a thousand square miles within the proposed 0.5 mV/m contour, the targeted Los Angeles advertising market, the common utility and recreational facilities used by all, and the recognized frequency system which permits daily cross-community movement for employment, cultural and recreational purposes. *See Beaufort County Broadcasting Co.* v. *F. C. C.*, 787 F.2d 645, 652 (D.C. Cir. 1986) (suburban community integrally part of larger metropolitan area when wide area coverage is proposed will be treated as part of metropolitan area). *Compare* the Commission's findings on separate communities in the Washington D.C. urban area:

> In view of the proximity of the communities involved, the regional channel at issue, the similar coverage of the proposals, and the already well-served reception areas of each, we conclude that section 307(b) considerations cannot be determinative in this proceeding.

*Seven Lakes Broadcasting Co., et al.*, 37 F.C.C. 82, 85 (1964) (Potomac - Cabin John and McClean communities deemed to be 307(b) transmission service because their community needs for diversification were served as part of the entire Washington urbanized area). Here, the relevant advertising market for all of these proposals establish a regional services for the Los Angeles area and no 307(b) preferences is applicable to any one proposal. In view of the conclusion reached on community needs, it is appropriate and in the public interest to determine the comparatively best applicant under principals of *Ashbacker, supra. See Hispanic Owners, Inc., supra.*

***Basic Qualifications***

181. Before conducting the comparative analysis, a determination of the basic qualifications of Cozzin Communications, Valley Radio and Radio Radio must be made. *Louis Adelman*, 28 F.C.C. 432 (1960), *recon. denied*, 29 F.C.C. 1223 (1960), *aff' d sub nom. Guinan, et al* v. *F. C. C.*, 297 F.2d (D.C. Cir. 1961).

***Misrepresented Real Party In Interest***

***Cozzin Communications Corporation***

182. In a comparative proceeding regarding RKO's broadcast license in Boston to which Cozzin is a party, the Presiding Judge found and held that Joseph Zingale, a Cozzin principal, had misrepresented facts to the Commission when he executed the signature of his wife and children on certain low power television applications. Judge Miller found in his initial decision that the acts were done with an intent to deceive the Commission. Accordingly, Cozzin was found to be disqualified. *See Contingent Initial Decision* (FCC 86D-47), released July 23, 1986. Judge Miller also disqualified Cozzin under a real party in interest issue. *Id.* The rulings of Judge Miller are dispositive of Cozzin's qualifications in this case. *See Order*, FCC 85M-320, released January 22, 1985. *Compare United Broadcasting Co.*, 49 Radio Reg. 2d (P&F) 597, 598 (1981) (party is collaterally estopped from relitigating factual findings and legal conclusions made in Commission orders).

***Misrepresentations of Financial Qualifications***

183. The Commission's application form, FCC Form 301, requires certification of the fact that "sufficient net liquid assests are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." *See Revision of Form 301*, 50 Radio Reg. 2d (P&F) 381 (1981).

184. In regulating the certification process, the Commission has held that an applicant must have at the time that it files a "reasonable assurance" that the necessary finances will be available. *Jay Sadow*, 39 F.C.C. 2d 808, 810 (Review Bd. 1973). It is not sufficient for an applicant to merely believe that it will be financially qualified by the time it obtains a construction permit. *Dutchess Communications Corp.*, 101 F.C.C. 2d 243, 246 (Review Bd. 1985). Where financing is to be provided by others, "the applicant must have a reasonable assurance of a present firm intention for each agreement to furnish financing." *Id.* More recently, the Commission's Review Board has held:

> The *sine qua non* for financial qualifications under prior case precedent and the new certification procedures is written documentation - - -. Similarly, where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements. (Citations omitted.) (Emphasis in the original.)

*Las Americas Communications, Inc.*, 1 F.C.C. Rcd 786, 788 (Review Bd. 1987).

*Valley Radio 670*

185. Valley is disqualified for two reasons: First, it has failed to establish that it has a reasonable assurance of sufficient funds from committed sources which are sufficient to construct and operate either AM or FM broadcast facilities in Los Angeles for three months without revenue. Second, it falsely certified to the Commission in its application that it was financially qualified to receive a grant in this case.

186. The Commission requires that each applicant be financially qualified to construct its proposed broadcast facility and to operate it for three months without revenues. *United Broadcasting Co.*, 93 F.C.C. 2d 482, 505-09 (1983). When an issue has been added it becomes the burden of the applicant to demonstrate by a preponderance of the evidence that it has made a reliable estimate having a reasonable basis in fact of its anticipated costs of construction and three months' operations. *Erwin O' Connor Broadcasting Co.*, 51 F.C.C. 2d 1114 (Review Bd. 1975). When put to the proof, an applicant also must have an adequately supportable financial plan and may not rely on mere belief that it will be financially qualified by the time it obtains a permit. *George Edward Gunter*, 104 F.C.C. 2d 1363 (Review Bd. 1986).

187. Valley has failed to meet the basic requisites starting with its low estimate of land costs which was understated by $600 thousand. In addition, Valley failed to take into account costs of installation, construction or renovation of studio space and operations and staffing.[5] In addition to being wide of the mark in assessing its costs, Valley had no reasonable assurance of funding. It could not rely on the credit which had been allocated by the lender to the Simi Valley station. Nor could Valley rely on proceeds of a hypothetical sale of the Simi Valley broadcast property and license as a funding source for the Los Angeles station. Valley has failed to identify a buyer who would be ready, willing and able to purchase Simi Valley and there has been no appraisal of the real estate and other fixed assets. *See Rose Broadcasting Co.*, 68 F.C.C. 2d 1242, 1246 (1978) (valid appraisal needed where realty is relied on as source of funding). *See also Vista Broadcasting Co., Inc.*, 18 F.C.C. 2d 636, 637 (Review Bd. 1969) (absent showing of liquidity fixed assets afford no reasonable assurance of funding). Aside from these considerations, even if liquidity were shown, the Simi Valley assets are of questionable value since they are subject to an indebtedness of $485,000, a circumstance which caused Valley to change its scheme of financing in 1986 to the Security Pacific National Bank. *See Memorandum Opinion and Order*, FCC 86M-2727, released September 4, 1986. Finally, Valley cannot rely on the conditional line-of-credit from Security Pacific because, as discussed below, it is not a commitment of funds as a matter of law. It also is noted that Valley's methodology for showing land costs was entirely out of order. Valley's estimated acquisition costs for RKO's land and tower structure of $2.3 million was based on tax related documents which were rejected because they lacked authenticating, no witnesses were produced who could explain their meaning and Valley failed to lay an adequate foundation for determining relevance and reliability. (Tr. 6576-83.)

188. Valley later amended its proposal to utilize a conditional commitment from Security Pacific National Bank for $3 million. For the reasons denying summary decision on the adequacy of that commitment it will also be rejected here. Valley is required to show it has a "reasonable assurance" that the $3 million "will be available" which means "a present firm intention for each agreement to furnish financing." *Dutches Communications Corp., et al., supra* at 246 n. 4. The Security Pacific bank only agreed "to give favorable consideration" when it will reconsider the matter in 1987. This funding source is not committed and fails to reflect the required present firm intention. Therefore, Valley has failed to show that it is financially qualified. *See Memorandum Opinion and Orders*, 87M-607, released March 19, 1987 (denying Valley's motion for summary decision on its financial qualifications).

189. In addition, it is concluded that Valley misrepresented to the Commission that it was financially qualified when it so certified. Mr. Cabranes was responsible for the initial filing of Valley's Form 301 application in 1983, at which time no budget estimate had been prepared. (Tr. 6182-86.) Nor does his testimony establish that he had gone through the necessary calculations which are needed to arrive at a reasonable budget. Such failures are evidenced by the grossly erroneous calculations made even after the issue was added in 1986. As indicated above, Mr. Cabranes did not even undertake the basic inquiry on costs to lease or purchase RKO's site or the cost of leasing another facility in the event Valley was unable to arrive at an acceptable arrangement with RKO. When Mr. Cabranes finally reduced Valley's budget to writing approximately three years late, he had seriously understated costs and yet he arrived at a figure which was about $2.85 million more than his claimed estimate at the time of filing in 1983.

190. These later efforts in 1986 show negligence on the part of Mr. Cabranes and not a continuing misrepresentation or lack of candor. But the first time out in 1983 when Mr. Cabranes certified that Valley was financially qualified there was a misrepresentation made to the Commission. In May 1983, Mr. Cabranes certified on Valley's behalf that "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." *See* FCC Form 301 at 5, Section III, Qs. 1. He also certified that "the statements in [the] application are true, complete and correct to the best of [his] knowledge and belief, and are made in good faith." *Id.* at 19, Section VII. The evidence establishes that when he certified, Mr. Cabranes had taken no steps to assure Valley's financing. He had not even prepared a budget on which to base reasonable estimates and he had not obtained any financing which pertained to RKO's Los Angeles stations. The financing obtained for Simi Valley could not serve double duty and Mr. Cabranes knew that or, in the exercise of reasonable business judgment, should have known it. The Commission has held that:

> [misrepresentation involves false statements of fact, while [lack of candor] involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form . . . . The seriousness of either offense depends on the facts and circumstances of the particular case.

*River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983) (footnotes omitted). Valley's unwritten mentally conceived budget presented through Mr. Cabranes' testimony did not demonstrate Valley's financial ability to construct and operate an FM or an AM station, let alone two stations. Moreover, Valley's purported reliance on funds committed for Simi Valley's construction and operation is so incredible that it is found to have involved a deliberate effort to deceive the Commission. *See Las Americas Communications, Inc., supra* at 788 and *Capital City Community Interests, Inc.*, 2 F.C.C. Rcd 1984 (Rev. Bd. 1987). *See also George Edward Gunter, supra* at 1366 (an applicant's financial certification must be true as to each applicant and where multiple applications are involved the financial resources should be available to construct all proposed facilities).

***Radio Radio, Inc.***

191. Radio also is disqualified for failing to establish the requisite financial resources and for falsely certifying its financial qualifications to the Commission. Ms. Woodson, who was represented as the prime mover of Radio's application, relied heavily on advice from Mr. Spire and she looked to Mr. Cornell to obtain financing commitments. But she was never quite sure that he had obtained it. Because of her uncertainty, she did not check the "Yes" or "No" boxes on Form 301. (Findings at Para. 165.) She omitted that critical step in disclosure on the advice of Mr. Spire. However, her reliance on others does not excuse her obligation to truthfully complete the Commission's application process. *Compare Partial Initial Decision*, RKO General, Inc. (Presiding J.) (WHBQ-TV, Memphis), 2 F.C.C. Rcd 4111, 4136 (1987) (Memphis Telecasters was held responsible for its principals' failure to check the Yes/No box in Form 301.)

192. As stated above at Para. 186, the Commission requires that each applicant be financially qualified to construct its proposed broadcast facility and to operate it for three months without revenue. *United Broadcasting Co., supra*. The issues added against Radio requires it to prove by a preponderance of the evidence that it was not lacking in candor when it failed to answer the question in Form 301 as to whether it was financially qualified and that it did not later falsely certify that it was financially qualified. *Erwin O' Connor Broadcasting Co., supra* 51 F.C.C. 2d 1114.

193. The efforts to obtain a financial commitment were meager at best. Mr. Cornell, a corporate attorney who had recently turned to investment banking, was introduced to Ms. Woodson through Mr. Spire. In April 1983, Mr. Cornell and Ms. Woodson met and she later related to Mr. Cornell a need for a $2 million finance commitment. She had no idea that Mr. Cornell's sources were not institutional commitments from investment bankers, but were merely two "friends" who would make primary and secondary loans. The loans would be 5 year term agreements during which time the lender(s)' lack of concern for collateral, an element of any credible business loan for venture capital, is explained by the fact that the so-called $2 million commitment had not been reduced to writing. Evidently, Mr. Cornell convinced his "friends" to bank on the value of the station's license. But it turned out that Mr. Cornell did not know much about his friends' financial conditions. (Findings at Paras. 166-168.)

194. All of these circumstances may not have been known to Ms. Woodson when she signed Radio's application in May, 1983. But after a conversation with Mr. Cornell and after consulting with Mr. Spire, she decided not to check off the Yes/No box thereby leaving Radio's application without any financial certification. (Findings at Para. 166; Tr. 5737.) In March 1984, almost one year after filing Radio's application, Ms. Woodson was prepared to step up and file a financial certification because she believed that Mr. Cornell had obtained alternative firm commitments. For assurance, she looked Mr. Cornell in-the-eye when he said. But in fact she actually knew no more about these financing sources than she did a year earlier. (Findings at Para. 170.)

195. Under these facts, it is concluded that neither in May 1983 when Radio filed, nor in March 1984 when it made it amendment, was Radio "ready, willing and able to effectuate its proposal" as the law required. *Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669, 676 (Review Bd. 1986). The mere reliance by Ms. Woodson, the person in-charge of the application, on Mr. Cornell's unrelated and undocumented business interests without an investigation does not meet the "reasonable assurance" standard required by the Commission. *See Dutchess Communications Corp., supra* at 246 n. 4. *See also Las Americas Communications, Inc., supra* at 788 (1986) (where individuals are providing funds they must support their undertakings with balance sheets or other financial statements). Radio is found to have failed to show its financial qualifications and has falsely certified to such qualifications. Therefore, Radio is found unqualified to receive a grant. *Id. See also Capital City Community Interests, Inc. supra*.

196. To summarize, it is found as a matter of law under these analyses that Cozzin, Valley and Radio are not qualified to construct and operate under a Commission broadcast permit or license.

## COMPARATIVE CONCLUSIONS

197. Cozzin, Valley and Radio are not qualified to become Commission broadcast licensees. *See Character Qualifications*, 102 F.C.C. 2d 1179, 1189 (1986) (Commission notes concern for traits which are predictive of failures in honesty or predictive of failures in compliance with Commission rules). Therefore, those applicants will not be compared with the three remaining qualified applicants, Future, South Jersey and Marisol. Since South Jersey proposes no integration of its principals into management, it remains to compare only Future and Marisol under the Policy Statement.

***Diversification***

198. Maximum diffusion of control of the media of mass communications is a factor of primary significance. *Policy Statement, supra* at 394. The Commission's Review Board has set the following standard to be used in assessing the comparative weight to be accorded media interests:

> [T]he appropriate comparative weight to be given to an applicant's other media interests is directly related to the type of other media, size of ownership interest, proximity of other media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media and their respective localities.

*TRC Communications, Inc.*, 59 Radio Reg. 2d (P&F) 92, 95 (Review Bd. 1985).

199. Future and its principals have no interest in a medium of mass communications and therefore Future receives full diverisification credit. (Findings at Para. 30.)

200. South Jersey and its principals own or control several media outlets in New Jersey and New York. These interests are considerable in that they include a weekly newspaper in addition to AM, FM and TV stations. Such multiple media holdings in two states are substantial enough to place South Jersey in last place under diversification. (Findings at Paras. 34-41.)

201. Except for Ms. Sewell, neither Marisol nor Marisol's principals own an interest in a medium of mass media communications. Ms. Sewell is a general partner of Marisol and as such she will have considerable control over Marisol's broadcast content. She also is president of the board of directors of *Caminos* Magazine, a bi-lingual monthly publication with a national circulation of 40,000. (Tr. 741.) There was testimony of a "pass along" circulation within the Los Angeles service area of about 200,000 but that evidence is rejected as speculative. (Tr. 741.) But Marisol is held to account for its diversification as a result of Ms. Sewell's association with *Caminos*. *Policy Statement*, *supra* at 394 n. 5 (managerial positions in other media within the area of coverage is a factor when held by person with significant managerial position in applicant). In that regard, Ms. Sewell's term as president of *Caminos* expired after the "B" cut-off and therefore that circumstance cannot enhance Marisol's diversification demerit. *Gainesville Media, Inc.*, 72 F.C.C. 2d 799 (Review Bd. 1978). However, the Commission has taken care to distinguish between print media and broadcast media in assessing diversification demerit. In a recent case, the Commission considered a Texas monthly publication with a circulation of 30,000 geared to the interests of the state of Texas rather than the local area. The impact of the Texas monthly was found to be "so slight that it will be given no weight" for diversification purposes. *Caldwell Broadcasting Corporation, Memorandum Opinion and Order*, FCC 86-245, released May 15, 1986 at Paras. 2-3. The *Caminos* magazine appears to be of the same quality: There is an editorial column, most of the magazine is concerned with entertainment and leisure, and there are few issues. (Sewell, Tr. 742.) Under these circumstances, the Sewell interest in the magazine will be assessed under *Caldwell* as so slight as to receive no demerit.

202. To summarize, Future has no diversification demerit. Marisol receives a demerit which is so slight that it will not count for diversification and it will not adversely effect Marisol's comparative position. South Jersey holds significant broadcast interests in New York and New Jersey and while these are non-dispositive since they are outside the Los Angeles area, they warrant assessing a substantial diversification merit against South Jersey.

*Integration*

*South Jersey and Cozzin Communications*

203. South Jersey and Cozzin do not propose any integration of ownership into management. Therefore, they cannot be considered as comparative candidates for RKO's AM or FM licenses in Los Angeles. Also, Valley Radio 670 and Radio Radio, Inc. are found to be unqualified to construct and operate a radio broadcast facility and therefore they too cannot be considered as comparative candidates. The only remaining qualified applicant for the AM facility is Future Broadcasting and thus Future is declared the contender against RKO in the final round for KRTH The integration proposals of the remaining two applicants for the FM facility, Future and Marisol, are assessed below.

*Future Broadcasting, Inc.*

204. Future's initial proposal in 1980 for 24 voting shareholders was changed by the "B" cut-off date to 15 voting shareholders and 9 non-voting shareholders. The 15 voting shareholders who hold 73% of Future's equity are each proposed to be integrated. This unanimous participation in management was adopted in 1984 by a pre-"B" cut-off amendment which was intended to improve Future's comparative position. (Findings at Para. 48.) RKO is the prime advocate opposing Future's proposal and offers the following arguments for rejecting Future. First, Future adopted its final proposal just prior to the cut-off in order to improve its integration proposal. (RKO PFC at Para. 212-213.) Second, Future created positions which only appear to be policy- making and then matched voting shareholders who qualified for minority or female preference with the so-called "policy" positions. (RKO PFC at Paras. 213-219.)

205. Future's decision in 1984 to up-grade its integration proposal was a legally neutral tactical decision which has no adverse effect on the comparative selection process. *See* 47 C.F.R. §73.3522(a)(2) (provision for amendments of right by date specified). For its part, Future saw that the competition mount between 1980 and 1984 after Future had litigated itself into consideration. *See generally New South Media Corp. et al.* v. *F. C. C.*, 685 F2d 708 (D.C. Cir 1982). Future then exercised its business judgment to improve its position by the last day on which the law provides for making such adjustments. *See Las Americas*, *supra* at 794 (amendments made as of right are not treated as comparative upgrading). So far, Future's proposal is in the clear. However, the second point raised by RKO which questions the *bona fides* of the tasks assigned to shareholders is more problematic. While the corporate change in 1984 is not *per se* violative of the communications laws, such last-minute changes involving a shift from voting to non-voting stock of the shareholders who do not qualify for a preference puts the Commission on notice that the new proposal should receive a "hard look." *Id.*

206. The law provides that if it appears that the former voting shareholders who switched to non-voting status actually retained control over the voters, then the proposal must be rejected as a "sham". *Chester Associates*, 102 F.C.C. 2d 93, 96 (Review Bd. 1985). Alternatively, if there appear to be bogus policy positions created in order to achieve optimal integration, such positions will be discounted and Future's numerical score will be reduced accordingly. The evidence fails to establish that former voting shareholders continued to exercise control after becoming non-voters. *Id.* The circumstances are suspect. But substantial evidence was not adduced to show the

absence of control in the 15 voting shareholders who were in place at the "B" cut-off. When Future filed its application in 1980, there were 24 shareholders with voting rights. Nine of the original 24, including Mr. Astor who was proposed to be the general manager and whose considerable broadcast experience would be lost in the reorganization, took non-voting stock and gave up positions on the board of directors without repayment of any part of their investment or diminution of financial obligations. In addition, prior to the reorganization, five of Future's shareholders (Ms. Daniels, Ms. Renteria, Mr. Morton, Mr. Rosario and Mr. Jones) were the only shareholders among the 24 who were slated for integration into management. After the reorganization, all 15 voting shareholders are to be integrated. The outcome of the reorganization is 100% integration with credit claimed across the board for a minority and/or a female preference. While these circumstances demonstrate an awareness on Future's part on how to advance a comparative case, there is not substantial evidence provided which would support a finding of a "sham," *i. e.*, continued control by the former voting shareholders. Similar attacks on a proposal based on circumstantial changes at "B" cut-off have been rejected. *See Coast TV*, 2 F.C.C. Rcd 2982, 2983 (Review Bd 1987) (100% credit awarded for "B" cut-off integration of 6 voting shareholders and 25 non-voting shareholders).

207. However, under further analysis it is concluded that the assignments of "policy-making" positions to the 15 voting shareholders raises concerns which preclude Future from receiving 100% integration credit. The *Policy Statement* sets the standard:

> In assessing proposals, we will also look to the positions which the participating owners will occupy in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports, or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

*Policy Statement* at 395. Such positions as bookkeepers, office managers and traffic managers have not been deemed to be managerial and those positions were not recognized as warranting an integration credit. *Makai Broadcasting, Inc.*, 102 F.C.C. 2d 322, 324 (Review Bd. 1985). The applicant must demonstrate that the role is managerial and that it will occupy 40 hours per week. Any doubt in the proof will be resolved against the applicant. *Washington Christian TV Outreach*, 99 F.C.C. 2d 396, 416-20 (Review Bd. 1984). Future's position assignments are analyzed below under these criteria.

208. The most questionable proposals, before even considering the nature of the expected duties, are the three sales managers: *Mr. Jones* - Local, *Mr. Serna* - General, and *Mr. Toshiyuki* - National. Future has failed to show that there is sufficient sales work involved to justify this tripartite configuration where each will retain a policy role. Mr. Serna is proposed to be the General Sales Manager and his ability to perform the duties and responsibilities of that important position is evidenced by his considerable experience in broadcast and broadcast related sales. (Findings at Para. 86.) Mr. Serna will set the sales quotas and he will coordinate the sale of spot times. (Findings at Para. 85.) He was always considered from the time of his stock purchase to be fully integrated into a policy-making job and the title of "general sales manager" comes closest to the "sales manager" policy position identified in the *Policy Statement*. Mr. Jones reports to Mr. Serna and he will operate under a budget set by Mr. Serna. (Findings at Para. 79.) Also, although Mr. Jones has sales experience it is in connection with distilled spirits and not broadcast advertising time. From these circumstances, it is concluded that Mr. Jones will not set policy but will follow Mr. Serna's lead. A similar conclusion is reached with respect to Mr. Toshiyuki. He is the proposed National Sales Manager. Yet he was unable to differentiate between local and national pricing systems and he was unsure of his staffing needs. Also, although an investor in Future since 1980, Mr. Toshiyuki did not commit himself to a sales position until 1984, and it appears that he accepted this position in order to keep his voting stock. (Findings at Paras. 88-89.) Therefore, Mr. Jones' and Mr. Toshiyuki's integration into policy-making management are deleted from Future's proposal.

209. The *Policy Statement* considers the director of "public service broadcasting" to involve policy making. Future seems to have split the position between *Ms. Renteria* as Public Affairs Director and *Ms. Cruz* as Public Service Director. Ms. Renteria is the logical choice to credit in this category in view of her media experience. (*See* Findings at Para. 61.) Conversely, Ms. Cruz appears to have been inserted in the position of Public Service Director in the 1984 reorganization because her husband, an original investor, chose not to integrate. (Findings at Para. 70.) Moreover, Ms. Cruz's proposal did not meet the test of cross-examination. She had no idea at the hearing of the size of the staff she would need. She had not planned even for an announcer and there was no planned coordination of public service announcing with the person to be in charge of minority affairs. (Findings at Para. 70.) Thus, Ms. Cruz's integration will be deleted from Future's proposal. *Compare Washington Christian TV Outreach, supra* at 418-19 (testimony failed to establish any reasonable assurance that an integration proposal would be effected as proposed).

210. Similar circumstances occurred with respect to the proposed integration of *Ms. Haynes* as the station's Minority Affairs Director. Ms. Haynes succeeded to her husband's voting interests when Future regrouped in 1984. (Tr. 3939.) She is proposed for a position which would develop policies to insure that the viewpoints of minority groups are reflected in the programming. That is the purpose for having a minority preference. Having a Minority Affairs Director would assist in effectuating that policy. But Ms. Haynes will not be making independent programming decisions. Those decisions will be the responsibility of the Programming Director. Nor will Ms. Haynes take part in hiring decisions. (Tr. 3951.) Nor will she be making policy in the closely related areas of public service announcements or public affairs programming. (Tr. 3952-53.) Thus, the position of Minority Affairs Director, while it could carry an important policy-making role, was not assigned the authority and responsibilities for effec-

tuating the policy needed to permit it being credited. Therefore, Ms. Haynes' integration will be deleted from Future's proposal.

211. Next, a hard look will be taken of Future's proposal for *Ms. Bell* as its Director of Sports Programming. The proposal and Ms. Bell's prospective role are too speculative to credit. Future has not determined the amount or type of sports programming it will broadcast and Ms. Bell has no idea of the amount or types of sports programs which will be attempted. There has been no decision reached on the number of persons to be employed in the sports department or whether it will need its own announcer. (Tr. 3130- 36.) She testified that she only "believes" that she will not report to anyone and that only the board of directors will review her policy decisions. But there are no defined policy decisions to make. Although the position of sports director is recognized as a management position under the *Policy Statement*, there has not been a sufficient showing of reasonable assurance to credit the proposal for Ms. Bell. *See Washington Christian TV Outreach, supra.*

212. *Dr. Garrido* does not fare well either under a hard look. She is proposed as Future's Financial Manager in which position she is intended to develop business and financial plans and to supervise a comptroller and outside accountants. Dr. Garrido is a practicing pediatrician. She has served as treasurer of certain professional and charitable groups but she is primarily a physician. (Findings at Paras. 51-53.) She will not set advertising rates or set salaries and she will not prepare budgets. Thus, the evidence is unclear as to how she will carry out her duties and meet her responsibilities. Also, it is an impressive and substantial circumstance that Dr. Garrido is an established pediatrician who works with handicapped children and who does not intend to give up her practice when she assumes these responsibilities. It also is noted that the *Policy Statement* does not account for such a position as policy-making. Further, this position more than any other would require demonstrated qualifications in financial matters before it can credibly be credited as policy-making. The evidence and reason establish that it is the comptroller who will direct outside accountants and who will be the day to day finance manage. Policies relating to financing will otherwise be set by the board of directors. Dr. Garrido's role would be more in the nature of a supernumerary. Therefore, Dr. Garrido will not be credited for integration into Future's management.

213. If Dr. Garrido must be rejected as a credible financial manager, even more so must *Ms. Smith* be rejected as the station's proposed Operations Manager. In that position Ms. Smith, who has a high school education with no particular technical training, would be required to supervise the station's Chief Engineer. Neither the role of Operations Manager or of Chief Engineer is recognized under the Policy Statement as policy-making. The evidence fails to illustrate in what manner Ms. Smith is planned to implement policy. (Findings at Para. 64.) She must depend almost exclusively on the Chief Engineer to make the station function as a broadcast outlet. For these reasons, no policy-making function can be attributed to Ms. Smith and she will not be counted in Future's integration proposal.

214. *Dr. Mezquita's* situation is much the same as Dr. Garrido's but the resolution of her proposed integration is more difficult to reach. Dr. Mezquita is proposed as the station's Director of Equal Employment Opportunity/Women's Affairs. In that position she is intended to supervise and make policy for the station's personnel department, counsel managers on EEO and ensure the station's responsiveness to those issues. (Findings at Para. 54.) She is now a practicing psychiatrist and she has demonstrated a willingness to work in local civic affairs. (Findings at Paras. 55-56.) She will perform duties for Future which would over-lap with Ms. Haynes, the Minority Affairs Director, and if Dr. Mezquita's position were credited the position left for Ms. Haynes would become so diluted as to be meaningless. Dr. Mezquita testified that she would have responsibility for ensuring ongoing compliance with the station's EEO program. (Tr. 3608.) Dr. Mezquita also plans to undertake recruitment and training programs for minorities. She views her role as one which will formulate EEO policy as she develops her recruitment resources and in view of shifting demographics in Los Angeles her evaluation of needs will be ongoing. (Tr. 3607, 3609, 3627.) Similarly, she has broad plans to use Future's broadcast capability to address needs of child care and other issues which are directly female oriented (single mothers and rape). These are all meaningful civic contributions but these do not show how definitive policy will be set and how it will effect programming through Dr. Mezquita's authority. The evidence fails to show the required nexus. Therefore, the proposal to integrate Dr. Mezquita is rejected and her integration will not be credited.

215. There are three qualifying integration proposals which will be considered together: *Messrs. Morton, Rosario and Turner.* (*See* Findings at Paras. 82-84; 90-92; 93-95.) The analysis of Messrs. Morton and Rosario may be shortened by the concession that their proposals should be accepted. (*See* RKO PFC at 95-97.) Mr Morton will be Future's News Director and in that capacity he will determine the over-all news policy and he will select the staff. He has worked in broadcast media as a journalist and as a news assignment editor. He also has taught journalism at USC. There is substantial evidence in the record to support the proposal for Mr. Morton. (Findings *supra* at Paras. 93-95.) Mr. Rosario will be the Program Director. He will formulate the programming policies and he will supervise announcers. His acting experience has been in radio and television as well as on the stage and screen. There also is substantial evidence in the record to accept Mr. Rosario's proposed integration into this policy-making position. (Findings *supra* at Paras. 82-84.)

216. *Mr. Turner* is Future's proposed Director of Advertising and Promotions, a position that is not recognized by the *Policy Statement* as one which is managerial and policy-making. However, a promotions director has been credited in one case by the Review Board. *See Cleveland TV Corp.*, 91 F.C.C. 2d 1129, 1140 (Review Bd 1982). But here there has not been any showing that Mr. Turner will supervise others or coordinate related activities and apply company policy as in the case of Ms. Daniels. Even the duties specified lack adequate description, although as argued by Future, Mr. Turner has experience in marketing and in promoting professional athletes which is relevant to advertising and promotional work. (Tr. 4049.) But there has not been sufficient evidence adduced to convince that there is a reasonable likelihood that the proposal will be effectuated. *Central Texas Broadcasting*, 51 Radio Reg. 2d (P&F) 1481 (Review Bd 1982). Mr. Turner is president and chief executive officer of the Reginald Turner Management Group, Inc. (Group). (Future Exh. 15.) The com-

pany has seven employees and Mr. Turner and his wife own all of its stock. The Group represents sports and entertainment personalities in business activities ranging from contract negotiation to financial advising, marketing, merchandising and promotion. About 70% of the Group's billings are attributable to Mr. Turner's clients. (Tr. 4048-52.) The venture is so important to Mr. Turner that he will remain with the Group as a consultant if Future's application is granted and he has no plans to divest his stock holdings. There was no adequate showing how Mr. Turner would rearrange his affairs to permit a full-time commitment to the station's management. *Blancett Broadcasting*, 15 Radio Reg. 2d (P&F) 1349 (Review Bd 1969). Therefore, his proposed participation in Future's management will not be credited.

217. This analysis of Future's integration leaves only the Daniels for considerations. *Mr. Lemuel Daniels* is proposed as Future's General Manager and Ms. Daniels is proposed as the Station Manager. Mr. Daniels is represented to be the station's senior manager and he will preside at all staff meetings. While he is represented as having the power to make policy, it is not clear what policies he will be responsible for developing. (Findings *supra* at Para. 73.) RKO correctly urges that the *Policy Statement* recognizes the position of general manager as one that involves policy-making and supervisory functions which in most cases qualifies as a management level position. (RKO PFC at 86.) But the evidence indicates that Mr. Daniels' authority will extend only to "external" affairs, i.e., the supervision of corporate attorneys, Future's contact with national and state broadcast organizations, and the liaison between the integrated managers and Future's board of directors. None of the department heads report to Mr. Daniels. Rather, they all report directly to the board of directors, the body with which Mr. Daniels is to establish a liaison. (Future Exh. 3, Tr. 2926.) Mr. Daniels is portrayed as an "ambassador without portfolio" who has absolutely no authority to set policy for Future's broadcast business. Compare that proposal with the recognized description of a general manager for whom no distinction is made as to external/internal responsibilities and who has ultimate authority over the day-to-day operations of the station and who has hiring and firing responsibilities. *Marr Broadcasting Co.*, 1 F.C.C. Rcd 691 (Presiding J. 1986); *Caldwell Broadcasting Corp.*, 100 F.C.C. 2d 103 (Presiding J. 1984). The Commission has held that quantitative credit will not be awarded without a showing that the person proposed for integration into management will hold meaningful "management and policy functions." *Fort Collins Telecasters*, 60 Radio Reg. 2d (P&F) 1401, 1408 (Review Bd 1986). Without some meaningful policy setting role in day-to-day internal management, there is no basis to award Mr. Daniels an integration credit.

218. *Ms. Margaret Daniels* will be the Station Manager. In that position she will implement policy as set by the board of directors. The position of Station Manager is one which is recognized as having significant management and policy functions. *See Policy Statement*, *supra* at 395. She is to coordinate the activities of all departments and resolve all conflicts. She will be the liaison with outside FCC counsel and most significantly, she will supervise the Editorial Director. It is in that latter capacity that she will set the editorial policy of the station. (Findings *supra* at Para. 57.) The record evidence further establishes that Ms. Daniels will coordinate daily activities and that she will resolve conflicts which are bound to arise in Future's many departments. In the final analysis, Ms. Daniels will interpret the station's policies as they are set by the board. She will apply Future's policy as the final arbiter of conflicts and her decisions will be final. (Tr. 2920; 3433.) *Compare Hispanic Owners, Inc.*, 99 F.C.C. 2d 1180, 1191 (Review Bd 1985), (*aff' d*, 104 F.C.C. 2d 861 (1986) (even where description of duties were sparse, a proposal is credited where position appears to involve management level functions). Accordingly, Ms. Daniels will receive full integration credit as Future's proposed Station Manager.

219. To summarize, Future proposed to integrate 15 principals accounting for 100% of the voting stock. Only five of these accounting for 31.5% of Future's voting stock will be credited for purposes of integration. These are: Ms. Daniels (9.59%); Mr. Morton (2.74%); Ms. Renteria (8.22%); Mr. Rosario (5.48%); and Mr. Serna (5.48%).

220. Ms. Daniels receives a female gender preferences. Ms. Renteria receives both a gender and a minority preference. Messrs. Morton, Rosario and Serna receive minority preferences. *See Cannon's Point Broadcasting Company*, F.C.C. 2d , *Slip Op.* FCC 88-45, released February 23, 1988 (presiding judges and Review Board are now required to consider comparative licensing cases consistent with Commission policy which was in effect prior to September 12, 1986). While a gender preference receives less comparative credit than a minority racial preference, the cumulative effect of Future's gender/minority make-up qualifies for a substantial credit.

221. The other qualitative credits earned by Future with respect to local residence, civic activities and broadcast experience are considerable. *Ms. Daniels* receives full credit for her local residence since 1961. Her broadcast experience will be credited as moderate since she ceased her broadcast activities in 1971. She receives full credit for her civic activities. (Findings *supra* at Paras. 58-59.) *Mr. Morton* receives moderate credit for his local residency of slightly more than fifteen years. He receives full credit for his broadcast experience which, as a broadcast journalist, would fit with his designated position of News Director. He receives a slight credit for civic activities. (Findings *supra* at Paras. 94- 95.) *Ms. Renteria* receives no credit for local residence because it is not in the city of license and there is no showing that she lives within the station's covered service area. She merits full credit for her broadcast experience and moderate credit for her local civic involvement. (Findings *supra* at Paras. 61-63.) *Mr. Rosario* receives no credit for local residence for the same reason. He is awarded a slight credit for his civic activities and a very slight credit for his limited broadcast experience. (Findings *supra* at Paras. 83-84.) Finally, *Mr. Serna* receives full credit for his local residence in the city of coverage since 1979 and the service area since 1968. He also receives full credit for broadcast experience which ties in with the position of General Sales Manager (account executive, sales manager, president of ad agency) and full credit for his civic involvement in the area since 1969. (Findings *supra* at Paras. 86-87.)

***Marisol Broadcasting, Ltd.***

222. The starting point in this analysis is whether Marisol's proposal can be credited in view of the effects of the structure of its limited partnership. There is no allegation that Marisol's proposal is a "sham" which would involve undisclosed control persons and which, if proven, would disqualify Marisol from any comparative consideration. *Compare Kist Corp.*, 102 F.C.C. 2d 288, 290 n. 5

(potential sham arrangements to be reviewed to ensure complete control by proposed management). However, there is argument and the facts raise serious questions as to whether Marisol's non-integrated limited partner has been sufficiently insulated from the managerial decision making process to credit its structural proposal. *See Anax Broadcasting, Inc.* 87 F.C.C. 2d 483, 488 (1981) (seminal Commission holding that actual passivity of limited partners is a prerequisite to crediting a tiered proposal).

223. A brief summary and review of Marisol's limited partnership structure and its operative effects on the scope of control among its principals is appropriate here. (*See* Findings *supra* at Paras. 107-108, 116- 119.) As in the case of Future, the Marisol principals also engaged in a major restructuring at the "B" cut-off. Initially, Marisol had four partners- three general and one limited. Their equity interests totalled 100%. In 1984, Marisol admitted two new partners, Ms. Brimberry and Ms. Chavez. Also, Marisol's structure was rearranged so that now there are five general partners and one non-integrated limited partner. But four of those five general partners also hold equity interests as limited partners. It is noted that in changing Marisol's configuration, a total of 65.7% of the interests of general partners changed hands in violation of one of the "Absolute Restrictions" of the partnership agreement.

224. Under the agreement, the Marisol general partners each have an equal vote and a majority of the votes cast will control most decisions. But there is a provision in the agreement that where the general partners are deadlocked on a particular vote the limited partners could designate a representative to break the tie. (Brimberry, Tr. 1062.) (*See* Marisol's RPFC at 12.) Under the present alignment of partners, it is difficult to perceive a tie among five general partners each holding an equal vote. Evidently, having such a tie-breaker provision contemplates the addition of more general partners. In any event, the provision on its face would allow a limited partner to become involved in a management decision at some indeterminate time. The potential power to break a tie carries with it the power to influence and persuade before that power needs to be exercised. In addition to having that tie-breaker power, limited partners assume the responsibility under Marisol's partnership agreement to contribute "engineering reports and exhibits and other materials" to the partnership. (Findings *supra* at Para. 116.) These are duties incident to persons who are involved in the active prosecution of an application. Conversely, such duties are inconsistent with the role of passive investor. Also, the agreement provides that a majority of the limited partnership interests must consent to the sale, assignment or substitution of general partnership interests and the limiteds must consent to the issuance of additional limited partnership interests. (*Id.*) It also provides for the generally accepted provision for removal of general partners for misconduct or gross neglect. (*Id.*) What is essential for this analysis, however, is the power assigned to the limited partners to control the number of partners. It gives Mr. George Castro, the only limited partner who is not also a general partner, the power to block the addition of any new limited partner. That means that Mr. Castro can materially effect the ability of the partnership to attract additional management and to raise new capital. In this way, Mr. Castro could hold out for his own choice and that makes Mr. Castro a co-equal with the general partners.

225. These circumstances are in part explained by the fact that Mr. George Castro was a promoter of Marisol's application efforts. He used the same attorney and the same engineer in his own broadcast application endeavors. Even Marisol's engineering bills were addressed to him. Mr. George Castro also gave Mr. Inzunza prospective leads for new participants and their was knowledge expressed of Mr. George Castro as an investor before Ms. Sewell and Ms. Holm agreed to join. (*Findings supra* at Paras. 113-114.) There also was a common tie between Mr. George Castro's brother Thomas, Mr. Inzunza and the other partners. While this evidence regarding Thomas Castro is tangential and too remote to establish an undisclosed principal, it is probative of the fact that George Castro was a promoter of the venture and it was in his interest to have the partnership structured in a hydra-headed fashion so that general partners would also be limited partners. Since the limited partners have the power to break-ties and to block the general partners from bringing in new capital, the dual structuring shifts Mr. George Castro up to the level of a general partner when a crucial tie vote is needed. Marisol offers no explanation for the dual arrangement and no other explanation is discernible from the facts.

226. In addition, the Review Board has criticized proposals where the same person is proposed simultaneously as a general partner and as a limited partner. *See Cotton Broadcasting Co.*, 60 Radio Reg. 2d (P&F) 982 (Review Bd 1986). In that case, a partnership, characterized by the Review Board as "bizarre," consisted of "three general partners at least one of whom is also a limited partner." *Id.* at 984. The Review Board held that a limited partnership agreement which purports to lodge complete and exclusive control in its general partners one or more of who is also a limited partner:

> deprives limited partner Ms. Barber of all managerial authority, while on the other hand it authorizes the same Ms. Barber to be a general partner with "complete and exclusive" managerial control.

*Id.* The Review Board rejects such a conflicting proposal even of state law authorizes it:

> Whether or not such a Janus-like arrangement comports with North Carolina law, it cannot be countenanced for ownership integration.

*Id.* The situation with Marisol is no different except that four of its five general partners are proposed as simultaneous general and limited partners.

227. It is concluded that Marisol has not given the Commission the required "reasonable assurance" that its limited partner will not participate in the control of business decisions and the prosecution of Marisol's application. The standard for accepting a two-tiered partnership proposal requires "no material involvement" of the limited partners and "complete managerial control over the station's operations" must be reposed in the general partners. *See Magdalene Gunden Partnership*, F.C.C. 2d , Review Bd. *Slip Op.* 87R-70, released February 1, 1988 at Para. 5 (arrangements and activities between two tiers of principals which undermine claims of passivity or *bona fides* are not to be ignored). Here, Mr. George Castro, the only limited partner, was the source for locating communica-

tions counsel and an engineer and also a resource for finding new members of the venture. These promotional activities, coupled with a structure which gives Mr. Castro a tie- breaker vote and the power to reject new capital investors, presents a totality of circumstances which are inconsistent with passivity. *See Magdalene Gunden, supra* at Para. 6 (activities of limited partner viewed as a whole were plainly inconsistent with Commission's fundamental limited partnership concept of passive investorship). Therefore, Marisol's proposal is rejected as lacking a "reasonable assurance" that only the general partners will control the management and operation of the station. *Bradley, Hand & Triplett*, 89 F.C.C. 2d 657, 662 (Review Bd. 1982). Also, such "Janus-like" integration proposals have been disallowed as to each general partner who also proposes to be a limited partner. *Cotton Broadcasting Co., supra*. Therefore, under both or either theory, Marisol's integration proposal fails to qualify.

*Contingent Comparative Analysis*

228. In the event reviewing authorities disagree with the initial conclusion reached herein regarding Marisol's proposal, a contingent comparative analysis is made between Future and Marisol. As indicated above, Future is the only qualified applicant left for the AM facility. Therefore, Future is the AM applicant selected to go against RKO in the final comparative round. But only five of Future's fifteen principals who are proposed for integration were accepted thereby reducing Future's proposal to 31.5%.[6]

229. Marisol has only five general partners intended for integration. *Mr. Inzunza* is the proposed Business Manager and Director of Sales and Marketing. He has experience in these areas. *Ms. Brimberry* is the proposed General Manager and Program Director. She has considerable broadcast experience. *Ms. Holm* is the proposed Assistant General Manager and Director of Human Resources; *Ms. Sewell* is the proposed Director of Public Services and Community Relations; an *d Ms. Chavez* is the proposed Director of News, Sports and Public Affairs Programming.

230. In 1983, when Marisol filed its application, only Mr. Inzunza, Ms. Sewell and Ms. Holm were proposed as general partners for integration. Mr. George Castro was listed as the limited partner. Between them and the "B" cut-off, Mr. Inzunza sought out Ms. Chavez and Mr. Sewell approached Ms. Brimberry. These two new general partners were added before the "B" cut-off and there do not exist in the case of Marisol the circumstances incident to Future's late hour changes which prompted the hard looks (e.g. voters becoming non-voters and husbands assigning votes and responsibilities to spouses). Nonetheless, in the interest of affording equal treatment to both parties, Marisol's proposals will be given further analysis. *See Melody Music, Inc.* v. *F. C. C.*, 345 F.2d 730 (D.C. Cir. 1965) (disparate treatment of parties not acceptable).

231. Full-time participation in station operations by owners is a factor of substantial importance in securing the best practicable service to the public. *Policy Statement, supra* at 395. In the course of controlling the progress of this case, the former Presiding Judge directed all applicants (except RKO) to serve complete and definitive descriptions of integration proposals which would include the hours per week to be devoted to assigned duties. *See Order*, FCC 85M-900, released March 4, 1985. *See Northland Communications*, 100 F.C.C. 2d 914, 917 (Review Bd 1985), *aff' d* 60 Radio Reg. 2d (P&F) 776, 777 n. 3 (1986) (presiding judge may set date for complete integration proposals). Marisol's integration statement timely filed on March 22, 1985, stated the following:

> Each of the general partners will be fully integrated into the management of the station on a full-time basis, *i. e.*, at least 40 hours per week - - -.

(Marisol Integration Statement, p.1.) Ms. Holm and Ms. Brimberry each confirmed in their deposition testimony their commitment to a 40 hour work week. Ms. Brimberry testified at the hearing that she would work a full 40 hour week. (Tr. 1093.) Thus, Future's contention that Marisol's failure to state 40 hour work weeks in proposed written testimony precludes the assertion of full-time integration is rejected. Future was on notice since 1985 as to what Marisol was contending and cannot now claim prejudice in the omission. Marisol's contention is further corroborated by proof that each proposed principal intended to resign from presently held positions in order to commit to the station on a full-time basis (Marisol Exhs. 3, 4, 5, 6, 7) and by Marisol's Certificate and Agreement of Limited Partnership which was offered into evidence by Future. (Future Cross Exh. 1, p.3.)

232. Future does not contest the proposal of *Ms. Brimberry* and with good reason. She will make the ultimate policy decisions as the General Manager, a position recognized as policy-making under the *Policy Statement*. Her integration proposal is accepted.

233. *Ms. Holm's* position as Assistant General Manager will not qualify. The position is not endorsed under the *Policy Statement* and it could be credited only if Ms. Holms were shown to have distinct duties. *See Reginald A. Fessenden Educational Fund, Inc.*, 59 Radio Reg. 2d (P&F) 1255, 1262 (Review Bd 1985) The evidence shows that Ms. Holm will assist the General Manager in the latter's duties. She will act as Ms. Brimberry's back- up in her absence and she will coordinate matters relating to the General Manager. (Tr. 1092-93.) *See* Marisol RPFC at 63-65. She also will be Director of Human Resources and in that capacity she will:

> supervise employment, compensation, benefits and record retention and coordinate the station's EEO and Affirmative Action programs.

(Marisol Exh. 4.) The fact that the position was added after the "B" cut-off is irrelevant since the former Presiding Judge had set March 25, 1985, as the date for submitting definitive integration statements. *See Northland Communications, supra*. But this is not a policy-making position having duties for which integration may be credited. *Compare* denial of credit for Future's Ms. Mezquita *supra* at Para. 214. The position description must reflect "policy functions and the likelihood of their playing important roles in management." The general partners set the policy for EEO compliance and any realistic policy must at least meet the standards required by the Commission. *See* 47 C.F.R. §73.2080 (Equal Employment Opportunities to be afforded by all licensees or permittees). The evidence indicates that "ultimate hiring authority" is at the general manager level. (Future Cross Exh. 4; Tr. 1090.) As for the extent that Ms. Holm will participate in hiring policies, it would only be as assistant to Ms. Brimberry. There is also circumstantial evidence which detracts

from Marisol's assertion that it intends to repose policy-making authority in Ms. Holm. The EEO section of Marisol's application identified Mr. Inzunza as the person responsible for the implementation of Marisol's EEO program and no amendment was submitted to change that allocation of responsibility. For these reasons the proposed integration of Ms. Holm will not be credited.

234. *Mr. Inzunza* is to have duties as Director of Legal and Financial Affairs, Business Manager and Director of Sales and Marketing. Mr. Inzunza was active in promoting Marisol and he has demonstrated a commitment to its application. (Findings *supra* at Para. 177.) He is experienced in banking and financing and has responsibilities for pricing, sales, and billing. (Findings *supra* at 123.) Future attacks his commitment because he took a temporary assignment to London in 1984. But that historical event is not inconsistent with Mr. Inzunza's stated commitment to the station. Mr. Inzunza will be fully-credited.

235. *Ms. Sewell* will be credited as the full-time Director of Public Services and Community Relations. In that position she will maintain contacts with the community, monitor community issues and propose programming. While she has no broadcast experience she has considerable experience in community work which lends credibility to the proposal. (Findings *supra* at Para. 136.) Public service broadcasting is credited under the *Policy Statement* and community affairs positions have been recognized as managerial. *Merrimack Valley Broadcasting, Inc.*, 92 F.C.C. 2d 506, 511 (Review Bd 1982). Therefore, Ms. Sewell's proposal qualifies.

236. *Ms. Chavez* will be credited as Marisol's Director of News, Sports and Public Affairs Programming. News and sports programming are recognized under the *Policy Statement* as policy-making positions which will likely play an important role in management. 1 F.C.C. 2d at 395. Since Ms. Sewell is credited with public service broadcasting responsibilities, credit for Ms. Chavez is limited to news and sports which is sufficient to qualify. She has worked in the broadcast media as a program producer and she would be a credible producer of news and sports programming. (Findings *supra* at Para. 139.) Her technical experience will also add to Marisol's public broadcasting capabilities. Her proposal is clear and unequivocal and it will be credited. (Marisol Exh. 7.)

237. To summarize, Marisol proposes to integrate five general partners each having an equal vote or 20% of the voting power. Only four of the five qualify and therefore Marisol receives an 80% integration credit which is substantially higher than Future's 31.5%.

238. Since Marisol has substantially more credit for integration, a quality comparison will not control the comparative outcome. Each of Marisol's four principals qualifies for minority enhancement and three of the four qualify for female gender preferences. Substantial broadcast experience is awarded to Ms. Brimberry while slightly moderate broadcast experience would be awarded to Ms. Holm but her integration failed to qualify so she receives no credit. Ms. Chavez receives a moderate credit for her broadcast experience and Mr. Inzunza receives none. Ms. Brimberry fails to qualify for local residence. Mr. Inzunza, Ms. Sewell and Ms. Chavez all reside within the service area. All four qualified principals have established involvement in local civic affairs but credit is awarded to only the three who reside in the service area.

*Comparative Summary*

239. Only Future and Marisol are compared for the FM facility because the other applicants either have not proposed to integrate or have been found to be unqualified. Marisol would be credited with 80% integration if it convinces a reviewing authority that there is a reasonable assurance that its limited partner is insulated from management and that its proposal is lawful. Future is credited with only 31.5% integration. Thus, Marisol would be the finalist on a comparative basis even though it has not proposed auxiliary power. Future has no diversification demerit and Marisol's is so slight that it will not be a factor. Marisol is slightly favored for its 80% minority and female gender management which numerically is superior to Future's. Marisol also prevails numerically on the local residences of three of its four qualifying principals.

***ORDER***

Accordingly, unless an appeal from this Partial Initial Decision is taken or unless the Commission reviews this Partial Initial Decision on its own motion, and subject to any further proceedings ordered by the Commission involving the application of RKO General, Inc. for renewal of its licenses for Stations KRTH and KRTH-FM, Los Angeles, California, IT IS ORDERED that the applications of Future Broadcasting, Inc. (File No. BP- 800924AC *(AM)* and File No. BPH-800924AA *(FM)* ) ARE CONDITIONALLY GRANTED, only one of which will be awarded to Future Broadcasting, Inc. after the applicant makes its election.

IT IS FURTHER ORDERED that the competing applications of Valley Radio 670, South Jersey Radio, Inc. Cozzin Communications Corporation, Marisol Broadcasting Ltd., A Limited Partnership and Radio Radio, Inc. ARE DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

**FOOTNOTES**

[1] There also were issues requested by parties which were denied. *See Memorandum Opinion and Order*, FCC 85M-1779, released April 23, 1985, denying RKO's request to add issue against Future that it was not financially qualified because its original financial estimates were based on an erroneous assumption that it could lease the premises; *Memorandum Opinion and Order*, FCC 86M-983, released March 17, 1986, denying Future's request to add issue of special minority sensitivity of one of its principals; *Memorandum Opinion and Order*, FCC 86M-1113, released April 2, 1986, rejecting request by RKO to add issue against Radio regarding its alleged failure to comply with a discovery order; *Memorandum Opinion and Order*, FCC 86M-2602, released August 20, 1986, denying Future's motion to add issue against Radio regarding its alleged failure to comply with an order to republish its hearing notice; and *Memorandum Opinion and Order*, FCC 87M-743, released April 2, 1987, rejecting further requests of Future to add issues against Radio concerning its alleged failure to maintain a public file, breach of a sequestration order, and untruthfultestimony.

The Presiding Judge added issues against Los Angeles broadcasting Co. and Stephen E. Powell, but the resolution of those issues was later mooted by the dismissal of those applicants. *See* note 1, *supra*.

[2] The Presiding Judge denied a request to include an isssue of misrepresentation against Valley regarding its alleged failure to make timely disclosure of the creation of a limited partnership.

[3] This letter from the Security Pacific National Bank dated August 14, 1986, was rejected as sufficient to support summary decision on Valley's financial qualification because it failed to reflect a present intention on the bank's part to loan Valley $3 million if it received the grant. *See Memorandum Opinion and Order*, FCC 87M-607, released March 19, 1987. Thus, by that ruling the letter became irrelevant as a matter of law and therefore was not received in evidence. (Tr. 6107-23.)

[4] RKO contends that the application of Section 307(b) to RKO would be inconsistent with the Commission's determination in *Pillar of Fire*, 90 F.C.C. 2d 1021, n. 1 (1982) where the Commission noted that 307(b) was not an appropriate issue to litigate in a renewal case when the transmitter site proposals were only 770 feet apart and were almost the same height indicating that the coverage would be substantially the same. However, that ruling was recognized later as being incorrect because an adequate record had not been developed. The Commission later held:

> Based on the above reasons, we determined initially that the public interest required resolution of this comparative renewal proceeding on factors other than 307(b) considerations. We now recognize that the better manner of proceeding would have been to designate a 307(b) issue. This would have facilitated development of a full record and foreclosed the need for further hearings in the event that unforeseen, overriding public interest considerations had required us to resolve this proceeding on the basis of 307(b).

*Pillar of Fire*, 2 F.C.C. Rcd at 520. Thus the Commission expects these questions arising under Section 307(b) to be fully developed and ruled on even in renewal cases where the coverage would remain unchanged.

[5] There is an extensive history in the record of Valley's underestimating costs and expenses which would need to be paid during early operations. For example, *news services* were calculated only for local service (not national services) and only for a one month period; *telephone* estimate of $452 required a multiplier of 3 to bring the cost to $1,356; *electric power* estimate of $1,100 required a multiplier of 3; *tower rental* estimate of $5,500 required a multiplier of 3. (*See* Marisol PFC at 37-40.)

[6] All of Future's directors are voting shareholders and each is ascribed a specific percentage of voting power. Only those five directors whose proposals qualify for integration will be counted. These account for total voting power of 31.5%. *See Reginald A. Fessenden* Educ at ion Fund, Inc., 59% Radio Reg. 2d (P&F) 1255, 1260-61 (Review Bd 1985).

[7] The Commission has directed that appeals be deferred from Partial Initial Decisions relating to the reactivated RKO cases. See RKO General, Inc. (WHBQ-TV), et al., 2 F.C.C. Rcd 1626, 1627-28 (1987). Thus, any appeals from this Partial Initial Decision shall be deferred pending further Order of the Commission.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-61**

In re Applications of

COYLE COMMUNICATIONS, LTD. File No. BPCT-870330KX

RURAL NEW YORK BROADCASTING File No. BPCT-870610KM

For Construction Permit for a New Television Station, Channel 48, in Corning, New York

**Appearances**

*James L. Oyster*, on behalf of Coyle Communications, Ltd.; *A. Wray Fitch, III*, on behalf of Rural New York Broadcasting; and *Charles E. Dziedzic* and *Arthur I. Steinberg* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

**Issued: March 31, 1988; Released: April 20, 1988**

**PRELIMINARY STATEMENT**

1. This is a ruling on a Motion for Summary Decision filed by Rural New York Broadcasting (RNYB) and a related Joint Request for Approval of Agreement between Coyle Communications, Ltd. (Coyle) and RNYB filed respectively on March 22, and March 14, 1988, which, if granted, would dispose of this case. The Mass Media Bureau filed its Comments In Support of Joint Request for Approval of Agreement on March 29, 1988. This case is now ripe for decision.

2. These two applications were designated for a comparative hearing to select a permittee to construct and operate a new commercial TV station to operate on Channel 48 at Corning, New York. *Hearing Designation Order*, DA 88- 130, released February 23, 1988, published at 53 Fed. Reg. 6198 (March 1, 1988) (the "HDO").[1] The parties have agreed to a settlement which contemplates an award to RNYB. The only impediment is an air hazard issue which was designated against RNYB. *See HDO* at Paras. 3, 5. RNYB filed a Motion for Summary Decision on March 22, 1988, which addresses the issue.

3. Under the terms of the proposed settlement, RNYB will pay Coyle Six Thousand Dollars ($6,000). In consideration of that payment, Coyle agrees to the dismissal of its application and to the award of the construction permit to RNYB.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

*Air Hazard Issue*

4. The Hearing Designation Order specified an issue against RNYB to determine whether its proposed antenna structure would pose a hazard to air navigation. *See HDO, supra.* On March 4, 1988, the Federal Aviation Administration (FAA) issued a "Determination of No Hazard to Air Navigation" on its FAA Form 7460-9 by an Airspace Specialist. *See Motion For Summary Decision* filed on March 22, 1988, at its Attachment. Such evidence precludes any need for further inquiry since the FAA's determination is conclusive as a matter of law in the absence of any substantial evidence to the contrary. *Southern Capital Television, Inc.*, 45 F.C.C. 2d 197 (1974).

5. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, RNYB has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, RNYB is found to have sustained this burden.

6. In light of the conclusive evidence found in the FAA's determination that RNYB's proposed structure would not pose a hazard to air navigation, there is no genuine issue of material fact that remains to be resolved. *See also* Bureau's Comments at 2 (RNYB is entitled to summary decision on the air hazard issue). Therefore, summary decision is appropriate.

*Settlement*

7. The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience or necessity, and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

8. In this case, with the air hazard issue resolved in its favor, only RNYB is qualified at this time to construct and operate a TV station. The Joint Request was filed timely in accordance with §73.3525. The parties have represented that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Also, the Bureau has no objection to approving the settlement. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules.

9. There has been compliance with the local publication requirements of the Commission's rules. 47 C.F.R. §73.3594(g). Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and its acceptance now ensures that a new TV service will be delivered to Corning, New York at an earlier date. The Bureau submits that the requested dismissals and the grant to RNYB would be in the public interest. *See* Bureau's Comments at 2. Accordingly, it is appropriate that the proposed settlement be accepted.

***Rulings***

IT IS ORDERED that the "Motion for Summary Decision filed by Rural New York Broadcasting on March 22, 1988, IS GRANTED and the designated air hazard issue IS RESOLVED in favor of Rural New York Broadcasting.

IT IS FURTHER ORDERED that the "Joint Request for Approval of Agreement" filed on March 14, 1988, IS GRANTED and the Agreement IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Coyle Communications, Ltd. (File No. BPCT-870330KX) IS DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that unless an appeal from this Summary Decision is taken to the Commission, or unless the Commission reviews this Summary Decision on its own motion in accordance with 47 C.F.R. §1.276 of the Commission's rules, the application of Rural New York Broadcasting (File No. BPCT-870610MK) to construct and operate a new TV station on Channel 48 at Corning, New York IS GRANTED and this proceeding IS TERMINATED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

**FOOTNOTES**

[1] The designation order was adopted on January 29, 1988, and therefore this case is subject to the hearing fee regulation. 47 C.F.R. §1.221 (1987); 2 F.C.C. Rcd 987 (1987). Notices of Appearance and the Joint Request for Approval of Agreement were timely filed and the Fee Section determined that no fees need be paid.

[2] This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

DIGITAL PAGING SYSTEMS OF PHILADELPHIA, INC.

File No. 21392-CD-P/ML-01-87

For a construction permit for additional transmitter facility to operate on 454.075 MHz at Bensalem, Pennsylvania

and

For a construction permit for additional transmitter facility to operate on 454.075 MHz at West Rock Hill Township, Pennsylvania

File No. 21397-CD-P/ML-01-87

## MEMORANDUM OPINION AND ORDER

**Adopted: April 12, 1988; Released: April 21, 1988**

By the Chief, Mobile Services Division:

1. Pocono Mobile Radio Telephone Company, Inc. (Pocono)[1] has filed a petition to dismiss or deny the above-captioned applications of Digital Paging Systems of Philadelphia (Digital) to which Digital has responded. Pocono argues that grant of Digital's applications would hamper Pocono's ability to provide efficient service to the public in its existing areas.

2. Pocono maintains that Digital has failed to demonstrate that its proposed system will be able to accommodate two-way use as required by Section 22.501(b) of the Commission's rules. Pocono points to Item 6A on Form 401 of the Digital applications indicating Digital's intention to offer only one way service. This is reinforced, Pocono maintains, by a review of the technical aspects of the applications which do not provide for a duplexer or a separate receive antenna required to provide two-way service.

3. Moreover, Pocono alleges that Digital's application for facilities at Bethlehem, Pennsylvania, File No. 21685-CD-P/L-1-85, will cause harmful interference to Pocono's existing facilities in the Stroudsburg, Pennsylvania area and to its mobiles operating in this vicinity. Pocono maintains that Digital's application for frequency 454.075 MHz at West Rock Hill, Pennsylvania will cause harmful interference to Pocono's existing facility in the Stroudsburg area.

4. In opposition, Digital states that it intends to provide two-way service on its proposed system and is already providing two-way service within the proposed service area on another of its systems. This intent is reflected, Digital states, on page two of its FCC Form 401 and exhibits.[2]

5. Digital argues that Pocono's allegations of potential interference are unsupported by engineering studies to support its claims. On the other hand, Digital asserts that it submitted detailed interference showings with its applications which include showings concerning Pocono's system. Those showings demonstrate, Digital contends, that no interference to Pocono's system will result from its operations.

## DISCUSSION

6. Pocono is correct that Commission rules provide that frequencies available for two-way service are also available for one-way or paging service so long as the two-way service is capable of being offered upon demand. The Commission has indicated a concern that two-way frequencies be used for two- way service. [3] Here, Digital claims that it inadvertently indicated on FCC Form 401 that it proposed to offer one-way service. Indeed, the exhibits to both applications demonstrate that the applicant intends to install the equipment needed to provide two-way service.[4] We accept Digital's explanation and find that two-way service will be capable of being offered on its system in compliance with Commission rules and policies.

7. Pocono's argument that Digital's applications will cause harmful interference to its facilities is not supported with facts. Digital's showing and our engineering analysis, reveal that no harmful interference will occur.

8. We find Digital to be legally, technically and otherwise qualified to construct and operate the proposed transmitter facilities and that grant of its applications is in the public interest.

9. Accordingly, IT IS ORDERED that the captioned applications of Digital Paging Systems of Philadelphia, Inc., File Nos. 21392-CD-P/ML-01-87 and 21397-CD-P/ML-01-87 ARE GRANTED.

10. IT IS FURTHER ORDERED that the Petition to Deny filed by Pocono Mobile Radio Telephone Company, Inc. IS DENIED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin Kelley
Chief, Mobile Services Division
Common Carrier Bureau

## FOOTNOTES

[1] Pocono provides two-way and one-way radio common carrier services in the Pocono/Stroudsburg, Pennsylvania area on frequency 454.075 MHz with Station KDS 328.

[2] Digital asserts that it inadvertently checked Box A of FCC Form 401 indicaing one-way service instead of the appropriate box indicating that two-way service is to be offered. According to Digital, this in no way was meant to indicate that it would not provide two-way service.

[3] *See* Revision and Update of Part 22 of the Public Mobile Radio Services Rules, CC Docket No. 80-57, 95 FCC 2d 769 (1983).

[4] Digital's West Rock Hill application indicates planned installation of an isolator and a filter which is the equivalent of a duplexer. Its Bensalem application indicates that a combiner, which contains a duplexer, will be used in that facility.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Liability for Forfeiture of

ADVANCED PAGING & COMMUNICATIONS, INC. File No. 63500-87-66-AW

Domestic Public Land Mobile Service
Station KNKG 538

## MEMORANDUM OPINION AND ORDER

**Adopted: April 12, 1988; Released: April 21, 1988**

By the Chief, Mobile Services Division:

1. On November 25, 1986, a Notice of Apparent Liability for Forfeiture was issued by letter assessing a forfeiture in the amount of $1000 against Advanced Paging & Communications, Inc. (Advanced Paging) because: 1) Advanced Paging did not request prior consent from the Commission for the *pro forma* assignment of the license for Station KNKG 538 from J & J Connection (J & J), a partnership, to Advanced Paging, a corporation, as required by Section 22.39(b) of the Rules; and 2) Advanced Paging had operated the 900 MHz one-way paging facilities of Station KNKG 538 without having filed the Form 489 notification required by Section 22.9(b) of the Rules. Advanced Paging requests that the proposed forfeiture penalty be set aside or significantly reduced.

## BACKGROUND

2. A construction permit for Station KNKG 538 was issued to J & J on February 21, 1985. The partners of J & J, David John Dare and Gerald Lee Dare, incorporated and formed Advanced Paging, which resulted in the *pro forma* assignment of the construction permit to Advanced Paging. However, the Dares did not request prior Commission consent to the *pro forma* assignment of the Station KNKG 538 construction permit by filing Form 401 and 490 applications, as required by Section 22.39(b) of the Rules. Instead, on August 9, 1985, the person assisting the Dares filed a Form 489 notification "reflecting a name change."

3. When construction of the Station KNKG 538 facilities had been completed, the Dares did not file a Form 489 notification, as required by Section 22.9(b) of the Rules. Instead, on January 15, 1986, the Dares filed a letter with the Commission stating that Advanced Paging was "proud to inform" us that construction of Station KNKG 538 was completed. Advanced Paging subsequently informed the Commission of the violations and filed the required Form 401 and 490 applications and Form 489 notification.

## ARGUMENTS

4. Advanced Paging first argues that the forfeiture should be set aside or reduced because: a) the violations resulted from Advanced Paging's status as a newcomer and its reliance upon a person who was not experienced communications counsel; b) the filing of the Form 489 to notify the Commission of the "name change" and the submission of the January 15 letter notifying the Commission of completion of construction, demonstrate that there was at least partial compliance with Commission procedures; c) Advanced Paging promptly followed the Commission's instructions to file a Form 489 notification and Form 401 and 490 applications, as soon as the violations were discovered; and d) imposition of the $1000 forfeiture would place a heavy financial burden on Advanced Paging and thus discourage it as a newcomer.

## DISCUSSION

5. We find that the applicant's arguments are without merit. Section 503(b) of the Communications Act of 1934, as amended, provides in pertinent part that "[a]ny person who is determined by the Commission . . . to have . willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation . . . shall be liable to the United States for a forfeiture penalty." 47 U.S.C. Section 503(b) (1988). Advanced Paging failed to comply with our Rules.

6. Advanced Paging's filing of the Form 489 notifying us of its name change and its submission of the January 15 letter notifying us that it had completed construction, do not constitute even a partial compliance with the Rules because the Commission could not reasonably assume that a name change was tantamount to a *pro forma* transfer nor could it reasonably assume by the January 15 letter that a Form 489 notice of completion would not be forthcoming.[1] The fact that Advanced Paging promptly filed the appropriate forms when they discovered the violations does not mitigate the seriousness of the violations. Moreover, we have previously noted that "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ." *Mobile Radio Telephone & Paging Service, Inc.*, Mimeo No. 2397, released February 16, 1983. Therefore, the fact that the violations may have resulted from Advanced Paging's status as a newcomer and its reliance upon inexperienced communications counsel does not persuade us to reduce the amount of the forfeiture.

7. Finally, Advanced Paging has not submitted any financial data to demonstrate an inability to pay the forfeiture. It has merely stated that it is a newcomer without a "stable cash flow". That fact is not, without more, sufficient to warrant a reduction in the penalty based on inability to pay.

8. In view of the foregoing, and pursuant to Section 503(b)of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Rules, IT IS ORDERED, that Advanced Paging & Communications, Inc. FORFEIT to the United States the sum of one thousand dollars ($1000) for the violation of Sections 22.39(b) and and 22.9(b)of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within 30 days of the release of this

order. If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

**FOOTNOTE**

[1] Advanced Paging cites several cases in which the Commission reduced the amount of forfeitures due to an applicant's attempt to comply with Commission's Rules. However, in those cases, the applicants' notification was sufficiently clear to apprise the Commission of the applicant's proposed action.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of
Request for Waiver of

The Arizona Board of Regents
for the University of Arizona 7320-02/W-2411
Tucson, AZ 87521

Licensee of station WEH 249
in the Private Operational-Fixed
Microwave Radio Service

**ORDER**

**Adopted: April 5, 1988; Released: April 21, 1988**

By the Chief, Private Radio Bureau:

1. The Chief of the Private Radio Bureau has for consideration a request for waiver of Section 94.73(a) of the Commission's Rules[1] filed by the the Board of Regents for the University of Arizona. Section 94.73(a) limits transmitter output to 20 watts in the 2.5 GHz band of the Private Operational- Fixed Microwave Radio Service (OFS). The Board of Regents has filed an application seeking to relocate OFS station WEH 249 with other facilities authorized or pending for microwave channels allocated for the Instructional Television Fixed Service (ITFS). The Board of Regents wishes to use a transmitter with 100 watts maximum output power at its new location.

2. The Board of Regents states that it intends to use a common receiving antenna and down converter for all of the collocated facilities. It contends that in order to use one receive antenna with all signals being at the same receive level, it is necessary for WEH 249 to have the same transmitter output power level as the ITFS groups, *i.e ., 100 watts. The Board of Regents alleges that it is not possible with available omni-directional transmitting antennas to achieve the same equivalent isotropic radiated power (EIRP)[2] using antenna gain and a 10 or 20 watt output from the transmitter. It further states that a directional antenna is not practical for transmitting because of the scattered locations of the schools, plants and hospitals that will receive its signals.*

3. The purpose of Section 94.73(a) is to limit interference potential by limiting power. We find that the potential for co-channel interference will not be increased beyond that permitted under the rules if we allow the Board of Regents to use an output power of 100 watts since the Board proposes an EIRP of 61 dBm which is well below the 75 dBm limit allowed by Section 94.73(a)(2) of the Rules. [3] EIRP rather than output power determines interference.[4]

4. In addition, this station will be collocated with an adjacent channel ITFS licensee. In its *First Report and Order* in Gen. Docket 80-113, 49 Fed. Reg. 25456 (June 21, 1984), the Commission said that in order to have successful adjacent channel operations in the ITFS band transmitting antennas should be cross-polarized, collocated and at the same EIRP. *Id.* at para. 135. The increase in power here would allow two adjacent channel stations to operate at the same EIRP and would thus reduce the possibility of adjacent channel interference.

5. We conclude, therefore, that the Board of Regents has demonstrated good cause for waiving Section 94.73(a) of the Rules and that a waiver will not undermine the goal of minimizing interference which the rule seeks to accomplish.[5] Accordingly, the Board of Regent's request for waiver of Section 94.73(a) of the Rules to permit the use of a transmitter of 100 watts maximum output power for WEH 249 is granted, pursuant to Section 0.331 of the Commission's Rules,[6] for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

**FOOTNOTES**

[1] 47 C.F.R. § 94.73(a).

[2] EIRP is derived from the transmitter output power plus the antenna gain minus any transmit losses.

[3] 47 C.F.R. § 94.73(a)(2).

[4] FCC Form 402, the OFS license application, asks for EIRP, not transmitter power, under the section titled "Transmitter Information."

[5] Thomas Radio Co. v. FCC, 716 F.2d 921 (D.C. Cir. 1983); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[6] 47 C.F.R. § 0.331.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-146**

In the Matter of

Amendment of Section 73.202(b), RM-6048
Table of Allotments,
FM Broadcast Stations.
(Osceola, Arkansas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: March 23, 1988; Released: April 14, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Pollack Broadcasting Company (petitioner), licensee of Station KWLN(FM) (Channel 251C2), Osceola, Arkansas, has filed a petition for rule making seeking the substitution of Channel 251C for Channel 251C2 and modification of its license accordingly.

2. We believe petitioner's proposal merits consideration since it could provide a first expanded coverage FM service to the community. A staff engineering analysis has determined that the proposed allotment of Channel 251C can be achieved at the petitioner's specified site,[1] consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.

3. In view of the above, we shall propose to modify the Class C2 license of Station KWLN(FM), as requested, in the event Channel 251C is substituted for Channel 251C2 at Osceola. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the proposed use of Channel 251C at Osceola.

4. Accordingly, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Osceola, Arkansas, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Osceola, Arkansas | 251C2 | 235A,[2] 251C |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 6, 1988,** and reply comments on or before **June 21, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Barry D. Wood, Esq.
Willard W. Pardue, Jr., Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] Compliance with our technical requirements is met based on reference coordinates at the site specified in petitioner's construction permit for Class C1 facilities (File No. BPH-850621IP), as follows: 35-28-00, 90-11-20.

[2] Channel 235A has been requested in RM-6132 and is being considered in a separate Notice of Proposed Rule Making with a conflicting proposal to allot Channel 235A to Gosnell, Arkansas (RM-5907).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

New York Telephone Company — Transmittal No. 875

Revisions to Tariff F.C.C. No. 41

New England Telephone and Telegraph Company — Transmittal No. 901

Revisions to Tariff F.C.C. No. 40

Petition for Waiver of Sections 69.205 and 69.206 of the Commission's Rules

**ORDER**

**Adopted: April 7, 1988; Released: April 8, 1988**

By the Chief, Common Carrier Bureau:

1. On December 11, 1987, New York Telephone Company (NYT) and New England Telephone and Telegraph Company (NET) (collectively NYNEX) filed the above-captioned tariff revisions that are scheduled to become effective on April 9, 1988. These revisions introduce and describe Minimum Divergence Access Service (MDAS) as part of Feature Group D (FGD). NYNEX states that MDAS is being offered in response to industry requests for expanded presubscription capability. It is scheduled to be offered in New York beginning in June 1988 and in New England in March 1988.[1] NYNEX also filed a petition for waiver of Sections 69.205 and 69.206 of the Commission's Rules, 47 C.F.R. §§ 69.205, 69.206, to permit continuation of the transitional Feature Group A (FGA) and Feature Group B (FGB) discount in the offices converted to MDAS.

2. MDAS affords end users the opportunity to presubscribe to their carriers of choice for 1+ interLATA service. Under MDAS, interexchange carrier (IC) traffic is routed to an access tandem which will access a database to determine the end user's primary IC. NYT Description and Justification (D&J) at 2; NET D&J at 2. NYNEX states in its transmittals that MDAS will be available in 58 specified end offices. NYT D&J at 1; NET D&J at Att. 1. Although 10XXX dialing will not be available with MDAS, access to other carriers will be available through FGA or FGB. NYT D&J at 1; NET D&J at 1. NYNEX proposes to ballot and allocate MDAS offices, but will also reballot these offices when 10XXX dialing becomes available via switch replacement at a later date, unless the Bureau grants a waiver at that time. NYNEX Opposition at n. 3.

3. NYNEX states that the proposed MDAS arrangement will cause an increase in post-dial delay of less than 4.5 seconds for NYT and less than 3.0 seconds for NET. NYT D&J at 3; NET D&J at 3. NYNEX intends to charge premium rates for MDAS, but will continue to offer FGA and FGB at discounted rates until such time as full equal access becomes available in each office. NYNEX states that this will benefit the other common carriers (OCCs) because they primarily use FGA or FGB to terminate traffic. NYT D&J at 5-6; NET D&J at 5-6. The NYNEX tariff revisions were not accompanied by any supporting data described in Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

4. NYNEX has also requested a waiver of Sections 69.205 and 69.206 of the Commission's Rules to enable it to continue the FGA and FGB discount. Sections 69.205 and 69.206 require that only premium charges be applied when access is provided through a local exchange switch that has the capability to provide access that is substantially equivalent to the access provided for MTS or WATS.

5. On December 28, 1987, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) and Southwestern Bell Telephone Company (SW Bell) filed comments on the petition for waiver. Also on that date, ALC Communications Corporation (ALC) and MCI Communications Corporation (MCI) filed pleadings combining comments on the waiver request with petitions for rejection or suspension and investigation of the tariff provisions; US Sprint Communications Company (Sprint) filed a petition for rejection or suspension and investigation. On January 11, 1988, MCI and SW Bell filed reply comments concerning the waiver petition and NYNEX filed an opposition to the petitions to reject or suspend its proposal.

6. ALC argues that NYNEX's filings contain a false presumption that 1+ dialing alone constitutes FGD service. ALC and MCI argue that FGD is the standard for equal access, and that because MDAS is not FGD, it is not equal access. MCI suggests that MDAS should be tariffed as a new feature group at an interim rate. ALC Opposition at 3-5, 11-12; MCI Comments at 2-5. ALC and Sprint contend that FGD must contain 10XXX dialing. ALC and MCI argue that lack of 10XXX is a severe competitive impediment to the OCCs. All three carriers claim that the omission of 10XXX precludes easy access to other ICs for the provision of international calling and operator services, and makes intraLATA calling very difficult for OCCs. ALC Opposition at 3-8; Sprint Petition at 6-8; MCI Comments at 6-8.

7. ALC, Sprint, and MCI further allege that four of the seven common FGD switching options will not be available, and that three of them, service class routing, trunk access limitation, and international carrier option, are very valuable. ALC Opposition at 9-10; Sprint Petition at 4; MCI Comments at 5-6. ALC, Sprint, and MCI also argue that the additional post-dial delay inherent in this proposal represents an unacceptable degradation of FGD service. ALC Opposition at 10-11; Sprint Petition at 4-6; MCI Comments at 8-9. Furthermore, ALC and MCI allege that NYNEX's failure to provide data pursuant to Section 61.38 of the Commission's Rules is by itself adequate grounds for rejection. MCI adds that unless NYNEX's switched access rates are revised generally, NYNEX will over-recover its revenue requirement because of increased premium access minutes of use. ALC Opposition at 14-15;

MCI Comments at 10-12. Sprint argues that AT&T will receive a superior service under MDAS because AT&T will have direct terminating trunks and because AT&T will receive all international traffic. Sprint Petition at 8-10. MCI argues that the proposed MDAS service has never been tested. MCI Comments at 4.

8. The petition for waiver is unnecessary, ALC and MCI state. Since MDAS is not premium access, no waiver is needed to charge transitional rates where MDAS is offered. ALC argues, instead, that all OCC access from MDAS offices should be charged at transitional rates. ALC Opposition at 13; MCI Comments at 3.

9. US West questions the logic and equity underlying NYNEX's waiver request, but does not oppose the waiver so long as the Commission allows other exchange carriers to discontinue discounts when equal access becomes available. US West Comments at 3-4. US West also distinguishes its alternative equal access service from the NYNEX proposal, stating that US West will provide 10XXX dialing. *Id.* at 4-5. Finally, US West rejects the idea that post-dial delays justify discounts for all ICs, and asks MCI to justify its request for such discounts. *Id.* at 5-10. SW Bell asks the Commission to limit its consideration in this proceeding specifically to NYNEX's proposal. SW Bell claims that its alternative equal access technology allows direct trunking and 10XXX access. SW Bell Comments at 2.

10. In its opposition, NYNEX argues that MDAS responds to NYNEX's Modification of Final Judgment obligations, is only an interim offering, supplies valuable presubscribed 1+ dialing, and treats all carriers equally. NYNEX Opposition at 2-3. Moreover, NYNEX maintains that the charging of premium rates would be fully justified because MDAS is "substantially equivalent" to FGD. *Id.* at 3. NYNEX states, however, that it has not proposed to require OCCs to pay full premium rates, but rather that MDAS will afford OCCs a discount of nearly 40 percent from full FGD premium rates because of the OCCs' ability to take advantage of the FGA and FGB discount in the terminating direction. *Id.* at 2. NYNEX contends that the estimated additional revenue from MDAS will be so negligible that it would not affect the overall switched access rates. *Id.* at 4. It also expresses willingness to file a six-month report containing actual data on post-dial delay, and to allow carriers the opportunity to test its technology. *Id.* at 4-6.

11. NYNEX also indicates that operator and International Direct Distance Dialing (IDDD) traffic will be routed to the end user's presubscribed carrier. *Id. at 6-7. NYNEX argues that 10XXX access will be available as soon as actual switch replacement is accomplished, and that the availability of FGA and FGB and full carriage WATS service will allow ICs intraLATA acId.* at 7. NYNEX further argues that the petitioners have exaggerated their need for the unavailable four FGD switching options. NYNEX argues that the OCCs do not now use two of these features in FGD offices (international carrier option and trunk access limitation), and that features performing similar functions to the other two (alternative traffic routing and service class routing) will continue to be available. *Id.* at 7-9.

12. In its reply comments filed in response to the NYNEX waiver petition, MCI generally reiterates arguments raised in its petition to reject or suspend. SW Bell, in its reply to the waiver petition, argues that the Commission should limit the scope of this proceeding to the NYNEX filings. SW Bell contends that its own technologies will provide actual equal access. Thus, SW Bell claims, the ICs should pay premium rates under the SW Bell plan. SW Bell Reply Comments at 1. SW Bell states that its system has been tested and that customers were not dissatisfied by any post-dial delay. *Id.* at 2-3. Finally, SW Bell reemphasizes that its system will include 10XXX dialing. *Id.* at n.6.

13. On January 29, 1988, the United States Department of Justice filed a report with the U.S. District Court for the District of Columbia concerning NYNEX's schedules for providing equal access. In light of that report, on March 30, 1988, NYNEX filed a letter with the Commission stating that it was reevaluating its proposal. NYNEX states that it might not offer MDAS in all of the original 58 proposed offices. However, NYNEX indicates that it appears likely that it will deploy MDAS at some locations. Therefore, NYNEX is not withdrawing the instant tariff revisions.

14. A waiver of the Part 69 rules is required because the proposed revisions would effectively establish charges that are lower than the premium rate and higher than the non-premium rate. We have concluded that such a waiver is warranted because the proposed service provides many, but not all, of the benefits of equal access. This waiver is granted on the condition that NYNEX fulfill its commitment to reballot affected customers at the time access is provided that satisfies all of the equal access requirements.

15. The Common Carrier Bureau has also reviewed the tariff transmittals and the pleadings filed by the above-listed petitioners and commenters and NYNEX. We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection and that an investigation of the revisions is not warranted at this time.

16. We do require, however, after MDAS has been in place for a reasonable amount of time, that NYNEX report to us regarding the amount of post-dial delay experienced by users. Specifically, NYNEX shall submit a report based on actual data gathered through a statistically valid sample measuring post-dial delay in converted end offices. The report must contain a detailed explanation of the manner in which post-dial delay was measured and the manner in which the sample of end offices was selected.[2]

17. IT IS THEREFORE ORDERED that the petitions against New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 875 and New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 901 filed by the above-listed petitioners ARE DENIED.

18. IT IS FURTHER ORDERED that New York Telephone Company and New England Telephone and Telegraph Company shall file a report containing post-dial delay data, as delineated above, on October 3, 1988.

19. IT IS FURTHER ORDERED that the New York Telephone Company and New England Telephone and Telegraph Company Petition for Waiver of Sections 69.205 and 69.206 of the Commission's Rules IS GRANTED subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] NET has already balloted customers for, but postponed implementation of, MDAS in Lawrence, Massachusetts. Scheduled June implementation in Brockton, Massachusetts, Portland, Maine, and E. 38th Street, New York, New York, has been postponed.

[2] *See generally* Alternative Equal Access Arrangements, DA 87-1887, released Dec. 29, 1987 (explaining our concerns regarding post-dial delay).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company

Transmittal No. 124

Revisions to Tariff F.C.C. No. 1

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 7, 1988; Released: April 8, 1988**

By the Chief, Common Carrier Bureau:

## I. BACKGROUND

1. On January 11, 1988, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed Transmittal No. 124 to establish Customer Network Reconfiguration Services (CNRS) to provide customers with customized network arrangements through the reconfiguration of their existing networks. According to US West, CNRS would appear in a new Section 15 in its tariff, and would incorporate a variety of tariffed services offered on an individual, unbundled basis to any customer whose requirements fall within the broad parameters governing CNRS. The scheduled effective date for Transmittal No. 124 is April 10, 1988.

2. In Transmittal No. 124, US West states that CNRS is furnished for the transmission of communications to meet specific customer network reconfiguration needs and is provided for a fixed term. US West further states that CNRS is provided in response to competitive requests from customers to reconfigure their physical networks. Finally, Transmittal No. 124 provides a brief description of each CNRS. Transmittal No. 124 at 15-1. In its Description and Justification, US West explains that services provided under CNRS are the same as those currently offered in other sections of the tariff, except that the terms, conditions, and regulations may vary. The first application of CNRS is Customer Integrated Data Network (CIDN), a service designed for the Sears Communications Network, Inc. CIDN is an interstate private line network that utilizes INFOSPAN Voice Grade 6 four-wire data channels, DA-to-DA interfaces, and optional features and functions. Description and Justification at 2-1.

3. Although CIDN is a new offering, the services and rate elements provided under CIDN are technically identical to those already appearing elsewhere in the tariff. *Id.* at 2-2, 2-4. CIDN services are furnished at fixed recurring and nonrecurring rates for an extended period of time, up to five years. *Id.* at 2-6. Under the original US West proposal, all services purchased within the fixed term offering would be at the rates tariffed to become effective on January 1 of the year in which the term was established. *Id.* at 2-7. During the term, however, the customer could enter into a new agreement with US West in a subsequent year and then could order additional circuits at the rates scheduled to take effect on January 1 of that year, or at the original base year rates, at the option of the customer. *Id.* at 2-10 - 2-11. US West would retain discretion to establish the duration of each term and to withdraw CIDN availability from the tariff at any time, but would honor all terms then in effect for their agreed duration. US West states that initially, however, it will provide CIDN for any term requested by a customer during the base years 1988 and 1989. *Id.* at 2-8.

4. Also under its proposal, US West waives the right to initiate rate increases for services provided under existing CIDN agreements without the express written consent of the customer. *Id.* at 2-11. The customer agrees to maintain a minimum number of channel terminations for the duration of the contract, and if the average number of channel terminations is less than the prescribed minimum, the customer will be assessed a penalty. *Id.* at 2-9 -2-10. If a customer terminates the CIDN agreement prior to expiration, a termination penalty will apply equal to 75 percent of the minimum charge for the unexpired portion of the term. The customer can terminate a CIDN agreement without liability if regulatory action imposed by the Commission materially changes the CIDN tariff. *Id.* at 2-13. US West alleges that its ratemaking procedure insures that regular monthly customers do not subsidize special access revenue shortfalls resulting from CIDN. CIDN agreements that produce a revenue shortfall will result in a rate of return for the special access category that is somewhat less than the authorized level; US West states that this shortfall will not be recouped. *Id.* at 4-2 -4-3. While US West does not expect CIDN to have any impact on the demand for other access services, US West claims that CIDN will minimize the erosion of demand for analog services. *Id.* at 5-2.

## II. PLEADINGS

5. MCI Communications Corporation (MCI) and ALC Communications Corporation (ALC) filed petitions to reject or, in the alternative, suspend and investigate. US West replied.

6. ALC argues that CNRS is unjust and unreasonable because US West is offering with rate stability the same service available elsewhere in the tariff without rate stability. In addition, ALC and MCI argue that it is unjust and unreasonable for an exchange carrier to guarantee to CNRS customers rates which were cost supported for a previous year on circuits ordered in a subsequent year. ALC Petition at 2-3; MCI Petition at 6-8. Furthermore, ALC and MCI argue that the offering is unreasonable and discriminatory because customers beginning their contracts late in the year will receive the January 1 rate even if the carrier has meanwhile instituted a mid-course correction. Thus, CNRS customers would pay different rates from other customers ordering service on the same day. ALC Petition at 3-4; MCI Petition at 6-8. ALC and MCI also argue that the terms and conditions of the proposed service offering are ambiguous. ALC Petition at 4-5; MCI Petition at 2-4. Finally, MCI argues that CNRS rates

would be unreasonably excessive if the Commission ordered decreases in other special access rates, and that the proposed nonrecurring charges are unjust because those charges apply even when no installation services are required. *Id.* at 5-6, 9-11.[1]

7. In its opposition, US West generally repeats its earlier defenses of CNRS and argues that the tariff revisions are not unreasonably discriminatory. US West states that the CIDN rates do not reflect mid-course corrections because keeping track of midyear rates would be too cumbersome, and because US West wishes to alleviate the pressure for CIDN customers to order their access service early in the year. US West Opposition at 5-8. US West argues that for CIDN customers, rate stability is worth the risk that the Commission might decrease other special access rates. *Id.* at 8-9. US West further states that it will eliminate the ability of existing CIDN customers to purchase new service at a prior year's price. All CIDN customers buying service in the current year will thus pay the current year's January 1 price. *Id.* at 9.

## III. DISCUSSION

8. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings filed by the above-listed petitioners and US West. We are persuaded that these tariff revisions are unreasonably vague. Specifically, the overall description of CNRS (as opposed to the CIDN service designed for Sears) is so general that a prospective customer would neither be able to tell the nature of the service, nor to whom it is available.[2] For example, new Section 15 of US West's tariff merely states:

**15.1 General**

A Customer Network Reconfiguration Service is furnished for the transmission of communications to meet specific customer network reconfiguration needs and is provided on a fixed term basis.

**15.2 Description of Services**

Customer Network Reconfiguration Services are provided in response to competitive requests from customers to reconfigure their physical network. A Customer Network Reconfiguration Service may incorporate a diversity of services to meet the specific needs of customers at specific locations.

Following is a brief description of each Customer Network Reconfiguration Service. . . .

9. This language is unreasonably vague in describing to whom the service is available, and under what terms and conditions. It is impossible to determine from the proposed revisions precisely what US West intends to do when a new customer requests CNRS. The proposed language gives no indication of the nature of network reconfigurations, or the type of fixed term arrangements, that would be encompassed by Section 15. Moreover, the language does not explain what would constitute a "competitive request" from a customer, what types of services would be included under the broad terms of Section 15.2, or how US West would exercise its discretion with regard to the incorporation of a "diversity of services" in response to particular customer requests. As such, we find that the proposed revisions violate the Commission's requirement that all regulations, exceptions, and conditions that govern a tariff be stated clearly and definitively. *See* Section 61.54(j) of the Commission's Rules, 47 C.F.R. § 61.54(j). These revisions are thus patently unlawful and are hereby rejected.

## IV. ORDERING CLAUSES

10. IT IS THEREFORE ORDERED that Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 124 IS REJECTED.

11. IT IS FURTHER ORDERED that the petitions to reject Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 124, filed by the above-listed petitioners ARE GRANTED. [3]

12. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company SHALL FILE tariff revisions not later than April 18, 1988 to be effective on not less than one day's notice to remove rejected material from the tariff and reinstate effective and pending material.

13. IT IS FURTHER ORDERED that Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, are waived and Special Permission No. 88-185 is assigned for the purpose of making the above filing.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

## FOOTNOTES

[1] US West has revised the transmittal to create a classification for "record only" changes, which apparently involve changes to billing records only.

[2] US West includes considerably more detail in its description of CIDN, but this elaboration would not assist a prospective customer in using the tariff to order a CNRS different from CIDN.

[3] The alternative requests for suspension and investigation are moot.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Alascom, Inc. Petition for Declaratory Ruling
Regarding Intrastate Private Lines

**ORDER**

**Adopted: April 7, 1988** **Released: April 8, 1988**

By the Chief, Common Carrier Bureau

1. By Public Notice released March 11, 1988, the Commission requested comments and replies on the Alascom Inc. (Alascom) petition for declaratory ruling regarding the proper jurisdictional treatment of certain private lines.[1] The Public Notice provided that comments were to be filed on or before April 11, 1988, and reply comments on or before April 26, 1988. On March 28, 1988, the Alaska Public Utilities Commission (APUC) filed a petition requesting a 30-day extension of the pleading cycle established in the above proceeding.

2. APUC states that additional time is necessary for preparation of their filing because APUC Chairman Knowles was out of the country when the APUC was notified of this filing and does not return until April 4, 1988. APUC states that at that time it is scheduled to begin a rate case lasting two weeks. Since any proposal for comments to be submitted by APUC must be considered at a public meeting, APUC states that the first opportunity for it to act on this matter will be a public meeting scheduled for April 27, 1988.

3. On April 1, 1988, Alascom filed comments regarding APUC's motion for an extension of time. Alascom supports an extension of time for APUC, but requests that the Commission retain the existing filing dates for other parties. In support of this, Alascom states that the Division of Telecommunications Operations of the State of Alaska has stated that it does not intend to stay final award of the contract at issue pending the outcome of the FCC proceedings. Alascom argues that it is important to minimize the time period between the final contract award and Commission action. GCI also filed comments on April 6, 1988 supporting APUC's motion for an extension of time, but arguing that the Commission should extend the filing dates for all interested parties.

4. Although it is the policy of this Commission that extensions of time shall not be routinely granted,[2] we believe that the public interest would be served by the development of a record that is as complete as possible in this proceeding. APUC has shown that it would be difficult, if not impossible, for it to file comments concerning the Alascom petition in the time period provided in the current pleading cycle. Therefore, we extend the time for filing comments and the time for filing reply comments by thirty days. While we recognize Alascom's concerns with regard to the timing of Commission action on this matter, we do not believe that it would be desirable to limit an extension of time to APUC since this would prevent the other parties from reflecting the discussion at the APUC April 27, 1988 public meeting in filings and foreclose any opportunity for them to respond to the APUC filing.

5. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that APUC's motion IS GRANTED.

6. IT IS FURTHER ORDERED, that comments in this proceeding are to be filed on or before May 11, 1988 and reply comments are to be filed on or before May 26, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] FCC Public Notice, DA 88-341 (Pleading Cycle Established for Comments on Alascom's Petition for Declaratory Ruling Regarding Jurisdictional Nature of Certain Private Lines), released March 11, 1988.

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Application of

GENERAL TELEPHONE COMPANY OF CALIFORNIA — File No. W-P-C-5927

For authority pursuant to Section 214 of the Communications Act of 1934, and Sections 63.01 and 63.57 of the Commission's rules and regulations to construct and maintain broadband transport facilities in Cerritos, California.

## MEMORANDUM OPINION, ORDER AND CERTIFICATE

**Adopted April 8, 1988** **Released April 12, 1988**

By the Chief, Common Carrier Bureau:

1. Before the Bureau is the above-captioned application filed by General Telephone Company of California (General) pursuant to Section 214 of the Communications Act of 1934 (the Act), 47 U.S.C. § 214, and Sections 63.01 and 63.57 of the Commission's rules and regulations, 47 C.F.R. §§ 63.01 and 63.57. General seeks authority to construct and maintain broadband coaxial cable transport facilities for its customers, Apollo Cablevision (Apollo), the Cerritos, California cable television franchisee, and GTE Service Corporation (GTE), a corporate affiliate of General. Petitions to deny the application were filed by the California Cable Television Association (CCTA) and the National Cable Television Association, Inc. (NCTA).

### I. APPLICATION

2. The proposed facilities will be constructed entirely within the City of Cerritos and will serve two customers. First, the facilities will be used to connect Apollo's headend cable television facilities with Apollo's customers throughout Cerritos. In addition, one-half of the cable capacity will be leased to General's affiliate, GTE, which will conduct comparative testing of coaxial cable, fiber optic and copper wire, for carriage of voice, data and video signals. The proposed system consists of approximately 170 miles of coaxial cable designed to pass more than 18,000 locations. The system design calls for a 78 video channel, bi-directional, sub-split facility, consisting of a single feeder design from Apollo's headend to end user taps. Initially, 41 forward and 4 reverse channels will be activated. In terms of bandwidth, Applicant notes that Apollo will have access to 275 MHz as will GTE, and GTE's lease also incorporates similar rates, terms and conditions as that of Apollo. Costs of these facilities are estimated to be $7.5 million.[1]

### II. PLEADINGS

3. In their petitions to deny, CCTA and NCTA argue that the leaseback arrangement between General and Apollo violates the Commission's telephone/cable television company cross-ownership rules, 47 C.F.R. §§ 63.54 and 63.55,[2] and presents a substantial potential for cross-subsidization. They argue that General has contracted Apollo's parent corporation, T.L. Robak, Inc. (Robak) to design and construct the proposed system. General will then lease the facilities to Apollo. Allegedly, General negotiated its agreement with Robak in conjunction with Apollo's lease. Thus, Petitioners reason that because Apollo is an affiliate of Robak and General has established financial ties with Robak, General has created a relationship with Apollo which is prohibited by the rules.

4. Petitioners also note that the agreement between General and Robak requires General to advance Robak $750,000. This money, they claim, is actually a loan to Apollo, which Apollo will only partially repay. Petitioners further charge that the agreement between General and Apollo provides for substantial deferral of monthly lease payments. Purportedly, under the terms of the agreement, Apollo makes no payments for eight months after commencement of construction, even though its parent, Robak, will have received $4 million in construction payments. In addition, they maintain, Apollo does not begin paying the full monthly rate until the 37th month subsequent to start of construction while the system is scheduled to be completed and fully paid for 18 months after the construction start date. Thus, Petitioners conclude that General is underwriting the leaseback arrangement with Apollo and thereby creating an impermissible creditor-debtor relationship. [3] In support of their positions, Petitioners cite *Pacific Bell, Inc.*, File No. W-P-C-5753, FCC 87-18, released January 15, 1987, a case in which "the Commission recognized that the agreement between Pacific Bell (Pacific) and CCC to reschedule use payments if CCC experiences financial hardship and to defer payment of the electrical power costs under certain circumstances 'could create a potential debtor-creditor relationship.'" As a result, the Commission conditioned Pacific's authorization to preclude such deferrals and rescheduling of payments. Further, CCTA is concerned that, because of the affiliation between General and GTE, General may have the chance to engage in cross-subsidization and to "warehouse" excess capacity for the benefit of Apollo. This "warehousing," CCTA argues, permits General to divert the carrying costs of the excess capacity from Apollo.

5. Both CCTA and NCTA argue that the application should be dismissed because, at the time the application was filed, Apollo had not formally been awarded the cable television franchise. NCTA further argues that under Cable Act a cable operator must acquire a franchise before it can commence service,[4] and that the Common Carrier Bureau has ruled that a telephone company's request for Section 214 authority should be dismissed when its customer does not have franchise authorization.[5] Finally, Petitioners contend that the application is procedurally defective because General did not provide an illustrative tariff as required by Section 63.01(o) of the rules.

6. In rebuttal, General claims that Petitioners fail to demonstrate they have standing as parties in interest. Citing *NAB Petition for Rule Making*, 82 FCC 2d 89, 93-96 (1980); *License Renewal Applications of Certain Broadcast Stations*, 68 FCC 2d 75, 76 (1978); *Telenet*, 74 FCC 2d

561, 567 (1979); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958). General argues that Petitioners must show "that grant of the application could directly cause potential injury to them."

7. General also claims the application should not be dismissed for want of a customer because, prior to the submission of its application, the City of Cerritos had issued a resolution to do business with Apollo. Even before that resolution, the City and Apollo had agreed to terms and conditions under which Apollo would provide cable television service in Cerritos. General believes that once the franchise process is in progress, the Commission's rules do not forbid the filing of a Section 214 application.

8. General states that its business ties with Robak do not establish an affiliate relationship between General and Apollo. Its agreement with Apollo is based on arms-length negotiations, with underlying economics similar to those proposed by other carriers and approved by the Commission, and its relationship with Robak varies little from what it might have with any other contractor. Just because Robak and Apollo are affiliates, its business ties with Robak cannot be imputed to Apollo, General argues.

9. According to General, the $750,000 advance Robak is to receive is no more than the down payment on the proposed construction. With a total system cost of $7,500,000, the proposed down payment is a reasonable deposit, as well as a sum to which Roabak is entitled pursuant to its contract.[6] General further explains that its deferred payment schedule for Apollo does not hinge upon Apollo's ability to pay as was the case with the customer in *Pacific Bell, Inc.* Rather, its schedule is predicated on the projected availability of homes passed. Because the completed system will not be available for several years, General reasons that equity requires Apollo to only pay for usable facilities. General concludes that Petitioners have failed to demonstrate that a relationship other than that of a carrier-user has been established. According to General, no loans or advances are being written off. As to cross-subsidization, General notes:

> neither the Communications Act nor the Commission's Rules bar a relationship between a telephone company and an affiliated company when neither party will be providing video programming to subscribers in the telephone company's service area. As discussed *supra*, neither General nor GTESC [GTE] will be providing video programming in any area.

Opposition, pp. 22-23. In General's view, "CCTA offers no reason why General would subsidize either Apollo or GTESC, or *vice versa*. " *Id*. General states that "the costs of the proposed facilities will be recovered fairly and ratably from the cost-causers." *Id*., p. 30.

10. General considers its proposal to be a private offering rather than common carriage, citing *National Association of Regulatory Utility Commissioners v. FCC*, 525 F. 2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976) (NARUC I), and believes submission of an illustrative tariff is unnecessary. It claims its proposal is similar to that of *Lightnet*, 58 Rad. Reg. 2d 182 (1985) and *Transponder Sales*, 90 FCC 2d 1238 (1982), *aff d sub nom. Wold Communications v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984). If necessary, however, General seeks a waiver of the Section 63.01(o) filing requirement based on information it has provided.

11. In reply to General's opposition, Petitioners maintain that they have standing, citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Petitioners also reiterate their claim that the $750,000 payment to Robak is a loan. In order to show that the $750,000 advance to Robak is unusual in the cable industry, CCTA submitted an affidavit of Tony Acone, President of Daniels Cablevision, Inc. and Chairman of CCTA's Board, stating that it is not common industry practice for a cable operator to advance a contractor its profits as a "start up fee." CCTA's Reply, Exhibit A, pp. 1 and 2.

12. NCTA contends that General's reliance on *Lightnet* and *Transponder Sales* is misplaced. In those cases, according to NCTA, the Commission was asked to address whether the sale and/or long term lease of fiber optic facilities or satellite transponders constitute common carrier services. The service General proposes to offer has been found previously to be an interstate common carrier activity, subject to common carrier regulations, it says. *See General Telephone of California*, 13 FCC 2d 448 (1968), *aff d* 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). Therefore, NCTA urges that General must file a tariff as required by Part 63 of the rules, 47 C.F.R. Part 63.[7]

13. At the request of the Common Carrier Bureau, General filed additional information which included a copy of the agreement between General and GTE and stated that "video-on-demand service" is a coaxial network capability with which GTE will be experimenting. In response to this information, CCTA states that the agreement between General and GTE is illusory because GTE is not obligated to lease any capacity on the coaxial system or to pay General any rent.[8] Based on this determination, CCTA argues that GTE is not a viable customer for these facilities and that General lacks a specific need for the requested facilities. It contends the only purpose for the excess capacity is to cross-subsidize Apollo. Further, while the Memorandum of Understanding[9] grants GTE access to General's local telephone network, its office facilities and certain General personnel, the lease agreement provides General no compensation for the use of these facilities and personnel.

14. NCTA maintains that GTE's recently disclosed proposal to provide "video-on-demand" service is an activity from which telephone companies and their affiliates are specifically proscribed within their telephone service areas by the Cable Act and the Commission's Rules. In its view, "video-on-demand" service is synonymous with pay-per-view service, encompassing a variety of programs from which subscribers may select. NCTA also states that Section 621(b) of the Cable Act proscribes the provision of cable service[10] directly to subscribers without a franchise, which neither General nor GTE has. Therefore, General has no customer for three-quarters of the 275 MHz of bandwidth, and cannot demonstrate a public need for the facilities.

15. In response, General advances that the cross-ownership proscription is applicable only when video programming is provided to the viewing public. Because both it and GTE are subject to the cross-ownership rules, General avows they will not undertake any activity which would bring them in conflict with the prohibition. General

Reply, pp. 3-4. There will be no offering of video programming by GTE over GTE's facilities; therefore a franchise of the type suggested by NCTA is not needed. General further maintains that GTE's status as a customer is not solely dependent upon the "video-on-demand" trials; other tests are planned,[11] and GTE will lease to others.

16. Contrary to CCTA's claim, General contends that its lease with GTE meets a basic principle of contract law, *i. e.*, agreements should be construed where possible to give each part effect. *See* Witkin, Summary of California Law (8th Ed.), Section 524, citing California Civil Code Section 1641 and California Code of Civil Procedure Section 1858. Thus, it believes that a court would find the lease to be real, rather than illusory. Finally, it recommends that the Commission judge its application on its merit and not on imagined horribles that are feared to flow from it.

## III. DISCUSSION

17. As a threshold matter, we find without merit Petitioners' allegation that General's application was prematurely filed. Two days before General filed its application, the City Council of Cerritos issued a "Resolution of Intent to Do Business" with Apollo. The City did award Apollo the franchise on March 4, 1987 and it became effective on April 3, 1987. This case is therefore distinguishable from *Pacific, supra* at note 5, where 7 months after filing its application, the telephone company still had no customer, and it was unclear whether it ever would. General has demonstrated that it had, or had reasonable expectation it would have, a viable customer for its facilities. We find this sufficient to conclude that its application was timely filed.[12] We now proceed to issues raised in connection with the application.

18. General's application for authority to construct a cable system is submitted pursuant to Section 214 of the Act. Under that section, the Commission must determine that a proposed construction, extension, acquisition or operation of an interstate line of communications by a carrier subject to Title II of the Act will serve the public convenience and necessity before the requested authority is granted. It is well settled that the construction of cable television distribution facilities by a telephone company is an interstate service requiring Section 214 authority.[13] *See General Telephone of California*, 13 FCC 2d at 454. *See also Lake Cablevision*, 41 FCC 2d 335 (1973); *Ohio Bell Telephone Co.*, 1 FCC Rcd 942 (1986). Where the carrier is affiliated with the cable television programmer, however, the rules contain special prohibitions that may preclude grant of the Section 214 certification.

19. Sections 63.54 and 63.55 of the Commission's rules, 47 C.F.R. §§ 63.54 and 63.55, provide generally that telephone companies are prohibited from engaging, or being affiliated with the entity engaged, in programming the channels in their service areas.[14] The primary purposes of these cross-ownership rules are to assure that telephone companies do not abuse their monopoly in their service areas and to preserve a competitive environment for the development and use of broadband cable facilities and services. Section 63.54 states that a telephone common carrier violates the prohibition against cross-ownership if it engages in the provision of video programming in its telephone service area directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with it. As to the intended breadth of "control" and "affiliate," note 1(a) to Section 63.54 states:

> As used above, the terms "control" and "affiliate" bar *any financial or business relationship whatsoever by contract* or otherwise, directly or indirectly between the carrier and the customer, *except only the carrier - user relationship*. [Emphasis added.]

In 1984 Congress codified most of the Commission's cable television-telephone company cross-ownership rules into the Cable Act, including the waiver provisions.[15] The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve. Cable Act § 601, 47 U.S.C. § 521.

20. The record shows that General's proposal includes contracting with Robak to construct the coaxial system and that Robak is the owner of Apollo, the cable television franchisee and General's customer. It is the contractual relationship between General and Apollo, through Apollo's principal, Robak, that raises the issue of "affiliation" in contravention of the cross-ownership rule. Applying note 1(a), General's construction contract with Robak must be imputed to Apollo. Moreover, construction of the cable television facility on a private contractual basis by General through Robak is not a carrier-user relationship within the meaning of note 1(a) by which the bar may be excepted. The carrier-user relationship exemption contemplates a general offer to provide substantially the same service or services to any and all similarly situated companies or members of the public on a nondiscriminatory basis. There is no indication in the record that General has an intention of making such an offering of the below-the-line operation it proposes. We cannot treat General's application as simply a common carrier facility construction proposal and grant Section 214 authorization. As a financial or business relationship between the carrier and its customer outside the carrier-user relationship, the instant construction proposal creates an affiliation between General and Apollo, and causes the contemplated arrangement to run afoul of the circumscription of the Cable Act and Section 63.54 of the rules. Notwithstanding this finding, an alternative remains available to General that could lead to Section 214 authorization.

21. Recognizing that an absolute prohibition on affiliation might prevent some communities from enjoying the expanded media provided by cable television, the Commission adopted an exception which, under certain circumstances, provides for waivers of the cross-ownership restriction. *See* Section 63.56 of the rules, 47 C.F.R. § 63.56. Pursuant to Section 63.56 of the rules, the Commission, on its own motion or on petition for waiver by a telephone company, may waive the cross-ownership prohibitions if cable video programming service would not otherwise exist except through cable television systems affiliated with the telephone company, or upon other showing of good cause, provided doing so serves the public interest, convenience and necessity. The record in this proceeding, however, did not address whether a Section 63.56 waiver should be considered, but, rather, was confined to the adequacy of the Section 214 application itself and the matter of alleged violation of Section 63.54. Ac-

cordingly, the Chief, Common Carrier Bureau issued an Order on November 20, 1987 seeking comment as to whether a waiver would be appropriate if the Commission were to find the GTE-Apollo arrangement inconsisistent with the rules. Order DA87-1692. Six parties submitted comments and six parties filed replies. [16] We now turn to this additional record to decide, in view of the cross-ownership policies and judicial standards, whether a waiver is justified.

## THE WAIVER

22. *Comments*. CCTA opposes Commission waiver of the cross-ownership rules, citing the need for protection against cross-subsidization and promotion of telephone company local distribution services. It states that the record does not show "such an elevated benefit to the public interest that the Commission should abandon the cross-ownership rules and their underlying goals." It also asserts that the city required a "high tech" cable system that only the telephone company could build, through "its ability to cross-subsidize and its incentive to own and control every communications wire going into the homes . . . ." CCTA Waiver Comments, p. 2. CCTA also refers to two federal court decisions, *Century Federal Inc. v. City of Palo Alto* and *Group W Cable v. City of Santa Cruz*,[17] which it says ruled state-of-the-art cable requirements like those in the Cerritos request for proposal (RFP) unconstitutional. CCTA concludes that a waiver in this case would preclude the competitive provision of data services by cable companies. For its part, Colony asserts that it is premature in view of the absence of a waiver request by GTE for the Commission to consider *sua sponte* waivers.

23. NCTA points to what it views as unresolved deficiencies in the Section 214 application and urges that a waiver under these circumstances is unwarranted. It states General has shown no need for a substantial portion of its proposed facilities, but if the application is granted conditions should be applied to assure compliance with the rules.

24. General again states its belief that its application is not inconsistent with the Part 63 filing requirements, and that it is offering private carriage to Apollo. It suggests that note 1 of Section 63.54 means no more than "control".[18] It also claims that it meets the waiver test of Section 63.56 and the general "good cause" standard of Section 1.3 of the rules. General cites *WAIT Radio v. FCC*, 418 F.2d 1153, 16 Rad. Reg. 2d 2107 (D.C. Cir., 1969), urging that a meritorious waiver request be given a flexible and "hard look". General states that the record indicates that Apollo was the only viable respondent to Cerritos' revised 1985 request for cable television proposals and that without GTE as a second customer to share the costs of the advanced broadband system the proposal could not be successful. General submits Cerritos' City Manager's Report to the Mayor and City Council (October 1, 1986) showing that (1) Kinneola Television Systems Corporation (Kinneola) proposed to have the City build the system, with Kinneola providing programming and management; (2) Mecum Enterprises, Inc. (Mecum), a cable television construction contractor, proposed only to construct the system, with the City financing it; and (3) Apollo provided three options, including a joint venture with a telephone company.[19] From this showing General concludes that a waiver is justified "on the ground that video programming 'demonstrably could not exist' but for the telephone company-cable operator relationships here." General Waiver Comments, pp. 4-5. General cites *Salina - Spavinaw Telephone Company*, 84 FCC 2d 645 (1981), to support grant of a waiver where no independent provider of cable service exists. General also asks the Commission to apply the principles of *Concord Telephone Exchange*, 78 FCC 2d 676 (1980), and *Shenandoah Telephone Company*, 84 FCC 2d 371 (1981), decisions in which waivers were granted to permit telephone company provision of cable television service in rural areas not adequately served by independent cable companies.

25. Responding to CCTA's "blue sky" characterization of Cerritos' cable system requirements, General urges the Commission "to resist interfering with the franchisor's 'channel and program' choices." General Waiver Comments, p. 9, citing *Pacific Bell*, 60 Rad. Reg. 2d 1175, 1180. (1986). Additionally, General asserts that without approval of the subject coaxial system the planned fiber system will not be constructed. It states that it has not offered details about actual services on its coaxial system because (1) it is not yet certain itself how the implementation of its interactive video services will unfold, (2) proprietary concerns caution against extensive publicity, and (3) "the nature and pace of the enterprise depend to some extent on the suppliers ultimately chosen for the optical fiber test sites." *Id*., p. 10. Nevertheless, General notes that GTE's video-on-demand service could be offered on a limited trial basis to 1,000 homes. This trial, it says, would require three-fourths of the bandwidth leased by GTE.[20] Finally, General suggests that its proposal is "not merely good cause [but] an opportunity to meet the statutory imperative of Section 7 of the Communications Act, 47 U.S.C. § 157, 'to encourage new technologies and services to the public.'" *Id*., p. 11.

26. NTCA, which represents some 450 small, rural exchange carriers, notes that "GTE was the only party whose proposal met the requirements of the City of Cerritos for its broadband delivery system." NTCA Waiver Comments, p. 2. It argues that the *Shenandoah* and *Navajo* [21] decisions are precedents for grant of a waiver in this case because here, as in those cases, no cable operator came forward. Citing *Clarification and Notice of Proposed Rule Making*, 69 FCC 2d 1097, 1107-11 (1978), NTCA urges that the "good cause" waiver showing is supported by the technological developments realizable through joint telephone-cable operations.

27. USTA, representing about 1,100 local exchange carriers, similarly supports General's application and submits that the record "clearly demonstrates that General has made a proper showing for authority to construct broadband transport facilities." USTA Waiver Comments, p. 2. USTA urges that General's application should be granted because it does not propose to provide video programming to subscribers, *i. e*., the video-on-demand trial is not video programming under the Cable Act. Moreover, it states, a waiver should be granted, if necessary, because cable service is not currently available to the residents of Cerritos. USTA notes the advantages of expertise, lower plant costs to consumers, greater local responsiveness and technical innovation that General can offer.

28. *Reply comments*. ACC, a cable television provider in areas bordering Cerritos, states that it requested a copy of the RFP issued by the City of Cerritos but determined that it could not economically construct the requested system, particularly with the added costs of the required 2-way interactive service. ACC also states that it was

fearful of the outcome of a complaint it believes General would file with the California Public Utility Commission claiming that ACC, by offering two-way services, would be providing "telephone service" as defined by the California Public Utilities Code. ACC asserts that if Cerritos were to issue a "reasonable RFP" it would be interested in building and operating the system, and that the residents would benefit from economies of scale.[22] ACC opposes grant of waiver to General and urges denial of General's Section 214 application. It characterizes the current proposal as "remindful of the 'blue-sky' franchising war days." ACC Waiver Reply, p. 3.

29. CCTA states that one option Apollo offered was to build an independent system without any telephone company involvement and, therefore, no waiver should be granted. It argues that one of the major purposes of the Cable Act was to put an end to franchising wars that led some cities to incorporate into their cable requirements capabilities that were not economically viable. CCTA also argues that General has not provided any showing that the advantage of its involvement in the Cerritos cable system outweighs the policy against a telephone-company owned system.

30. Colony states that it operates individually or through joint ventures cable systems in six communities in the Cerritos area. All of these systems, it adds, are "new builds and exemplify state-of-the-art technology." Colony Waiver Reply, p. 2. Like ACC, it says it evaluated the Cerritos RFP and concluded that the economies of the project would not support a system of the kind specified by the City. It characterizes the City's expectations as "unrealistic" in some, though unspecified, respects. It states, however, that it remains ready, willing and able to construct and operate in Cerritos "a system comparable to that which has fully satisfied the needs and interests of the other Southern California communities served by Colony." *Id.* Colony acknowledges the appropriateness of considering competing proposals, but views the subject proposal as "the kind of situation which the cross-ownership rules are intended to prevent." *Id.*

31. Comcast, for its part, claims that it could serve the City of Cerritos via an extension from its headend at Buena Park[23] but it states that it did not inquire about the Cerritos franchise until March 1987, long after the franchise application process had been completed and after award to Apollo.[24]

32. NCTA argues that, by implication, Section 613(b)(4) of the Cable Act, 47 U.S.C. § 533(b)(4), invalidates the Commission's authority to waive the cross-ownership prohibition on its own motion.[25] NCTA asserts that the legislative history of the Cable Act reveals that Congress intended the Commission's waiver authority to be narrowly construed, which it asserts limits reliance on *WAIT Radio*, *supra*, and other waiver cases. NCTA claims that the Commission "has never granted a waiver under the 'demonstrably could not exist' criterion except in cases where the waiver was intended primarily to facilitate the provision of cable service to an underpopulated area." [Citations omitted.] NCTA Waiver Reply, p. 4. Cerritos is not an underpopulated area, says NCTA. Citing *Sugar Land Telephone Company*, 76 FCC 2d 230 (1980), NCTA also asserts that the Commission has never found "other good cause" for waiving the cross-ownership prohibition and concludes that General has not established grounds for a waiver of the cross-ownership rules. As to a general waiver, *i. e.*, Section 1.3 of the rules, NCTA urges that General's application should be denied or modified and granted, but in no case should a general waiver be granted. According to NCTA, General has offered no reasons why the Commission should allow the affiliations and relationships characterizing the subject application. It states that the proposed $750,000 advance payment to Robak is not a carrier function as contemplated by Note 1 to Section 63.54. NCTA asserts that the legislative history of the Cable Act indicates Congress' intent to codify the then-current (non-rural) rules concerning video programming by telephone companies, including the note 1 definition of affiliation. NCTA insists that to justify a waiver General must either demonstrate that, without provision of the $750,000 advance, video programming demonstrably could not exist, or that there is some other good cause not to prohibit the loan. NCTA states that General has failed to make either showing and the waiver "is wholly inappropriate." NCTA Waiver Reply, pp. 7-8. NCTA, noting that Apollo submitted alternative proposals that involved no advance payment from General, argues that General is not a necessary party to the provision of cable service to Cerritos. NCTA concludes that GTE's pay-per-view service has not been consistently or completely described and in any event cannot constitute justification for a waiver or grant of a facilities authorization.

33. In its reply, General alleges that NCTA and CCTA misunderstand the waiver matter and persist in arguing the merits of the rules themselves. Citing *WAIT Radio*, *supra*, General argues that waivers merely create particular exceptions to regulations and would not in this case, as alleged by CCTA, "forever preclude" or "virtually guarantee" replacement of the independently-owned second wire with one owned and controlled by the telephone company. General emphasizes that *WAIT Radio* requires a "hard look" at a waiver and the Commission cannot deny it on the ground that there would be a violation in the absence of the waiver sought. General Waiver Reply, p. 3. In response to NCTA's concern about video-on-demand service, General states that 200 MHz of cable spectrum is a reasonable requirement and that GTE is a valid service customer and can sublet its service to an independent video programmer. As to the $750,000 down payment, General asserts that the burden is on NCTA and CCTA to demonstrate that the advance "might somehow provide the opportunity for a flow of funds from General to Robak's subsidiary, Apollo Cablevision." General Waiver Reply, p. 5. On the matter of the *Century Federal, Inc.* and *Group W Cable* cases cited by CCTA, *supra*, General responds that neither Cerritos nor the FCC is in the Northern District of California, the City of Palo Alto has appealed *Century Federal Inc.* to the United States Supreme Court, there is a conflicting decision in another District Court,[26] and the FCC granted Pacific Bell's Section 214 application during the pendency of the *Century Federal, Inc.* appeal. In *Pacific Bell*, General notes, the Commission said it "has deferred to state and local authorities on matters relating to the issuance of cable television franchises." 60 Rad. Reg. 1175, 1180 (1986). In response to Colony's argument that General can apply for a waiver only if the Commission denies its application, General states that "it would be a waste of the Commission's resources to repeat the waiver process later . . . ." General Waiver Reply, p. 6. General asserts that the issue is one of substance, not procedure, and that the Commission is entitled to supplement the record before it decides the matter of "good cause". Finally, General claims that

the substantive and procedural requirements for waiver have been met and that a grant based on waiver is fully justified.

34. *Resolution*. The Commission's policy regarding waiver of restrictions against telephone company provision of cable programming is reflected in Section 63.56 of the rules, which was included in Section 613(b) of the Cable Act, 47 U.S.C. § 533(b). Section 613(b)(4) states:

> In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

The language of the statute read with its underlying policy reflects Congress' intention to "ensure that we extend access to cable to as many people as possible."[27] Although Congress generally intended to exclude local telephone companies from providing video programming in their telephone service areas, it recognized that in some markets cable might never develop absent direct or affiliated involvement of the local telephone company. Thus, in rural areas, cable-telephone cross-ownership is not barred. Cable Act, § 613(b)(3), 47 U.S.C. § 533(b)(3). In non-rural areas, the Commission may grant a waiver where video programming demonstrably could not exist except through affiliation with the local telephone company or where other good cause is shown. 47 C.F.R. § 63.56.

35. Under the "demonstrably could not exist" standard, a telephone company must "show clearly, prove or make clear by reasoning or evidence"[28] that video programming could not exist absent affiliation. The record shows that Cerritos conducted an exhaustive process to select a franchisee to provide cable service to its 16,000 homes. Its first solicitation netted no viable responses.[29] Its second, modified RFP yielded three submissions, *i. e.*, from Mecum, Kinneola and Apollo. Only one set of proposals was found to be "legitimate" by the independent consultant hired by the City to make a recommendation to the Mayor and City Council, *viz.*, that provided by Apollo. Mecum proposed only to construct portions of a cable system and, in any case, failed to complete any of the forms required in the RFP; and Kinneola proposed only to provide programming and management, requiring the City to construct the system. The City was prepared to accept any one or combination of bidders who could, singly or together, construct and operate the system specified in the RFP. Neither Mecum nor Kinneola submitted "legitimate" proposals, in the City's view. Apollo, however, offered three options. One of these required City financial backing for the construction of the system, which was rejected because it would have required significant tax dollars to undertake the project. Another Apollo proposal would use only 20 channels initially, would not include local origination capability and would feature few of the RFP-required enhancements. It was therefore also rejected. Instead, the City chose a proposal offering essentially the full complement of video programming channels and capabilities the RFP specified. In short, Cerritos found that the only feasible way to have its video programming services specified by the RFP was, and is, to rely on the affiliated venture of Apollo and General. The final agreement between Apollo and General requires Robak to construct the system, which would be owned by General and operated by Apollo.

36. A number of commenters would have us substitute our judgment for that of the City regarding the nature and features of the cable facilities to be constructed, suggesting that in ruling on this waiver request we find the system required by the City to be unreasonable or we determine that a lesser system will suffice. We do not believe that kind of Commission intervention would be proper in this case. The Cable Act itself creates a dichotomy between the local franchise authorities and the FCC. While the FCC can set technical requirements, the local franchising authorities are given authority over the franchising of cable systems. It is the local authority, therefore, that generally has the authority to set the terms of the RFP -- subject, of course, to the constraints set forth in the Constitution and by Congress in the Cable Act. The legislative history of the Cable Act[30] further suggests that Congress did not intend general Commission oversight of local franchise decisions.[31] While one of the general concerns of Congress, particularly during the rapid growth period of urban cable systems, was the requirement by franchising authorities for unnecessarily advanced systems featuring state-of-the-art technology and excess capacity, *i. e.*, "blue-sky" systems, Congress specifically expressed the view that:

> Many franchise agreements in effect today specify in great detail the type of facilities that a cable operator must construct (e.g., channel capacity, two-way capability, and "institutional loop" to link libraries and hospitals), as well as the services that the operator must provide (e.g., Cable News Network, HBO, the Health Channel.) The ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community, and HR 4103 explicitly grants this power to the franchising authority. However, the Committee does not believe it is appropriate for government officials to dictate the specific programming to be provided . . . .

House Report, p. 26. Thus, in balancing the many competing interests before it, Congress decided to limit cities' authority in some areas, but left them considerable latitude over the franchising process. Because we conclude that in making its decisions about whether it wants an underground cable system and the other requirements set forth in the RFP the City of Cerritos appears to have acted consistently with its authority under the Cable Act, we will not consider here whether all of these requirements are necessary or desirable.[32]

37. Furthermore, the Commission has neither the expertise nor the resources to determine what particular mixture of cable television facilities or capabilities is optimal for the communities of this country, even if we had the authority to substitute our judgment for that of local

officials. Thus, while ACC, Colony and Comcast assert in their reply comments that they can provide cable service in Cerritos, (1) none has submitted a proposal to the City and (2) their statements do not indicate that they are willing or able to offer the cable system required by the RFP. Even with the substantial record compiled in this proceeding, it is not apparent whether the alleged "infeasibility" of the RFP turns on the requirement that the system be underground, that it have bi-directional capability, that it have 78 channels, etc. NCTA urges that one of Apollo's alternative proposals, *i. e.*, one of its first two options, be mandated in preference to the City's selection of the affiliation approach – to avoid the involvement of General. As explained above, however, neither alternative was acceptable to the City. Indeed, it was the unacceptability of these alternatives that led the City to choose Apollo/General; with GTE as a second subscriber to the Apollo-General system, the economics of the Cerritos cable television system become viable.[33] On the basis of the foregoing, we conclude that, for purposes of the Communications Act and our rules, the City of Cerritos will not be able to have its cable video programming service unless it is provided by Apollo through its affiliation with General and that a waiver, with conditions, is warranted.[34]

38. Returning to the matter of the application itself, Petitioners allege that the arrangement between General and its customers presents General with the opportunity to engage in cross-subsidization.[35] In previous cases where telephone companies have been involved in the provision of cable service within their telephone service areas and the issue of cross-subsidization was raised, the Commission generally determined that such activities could be detected and hence minimized by requiring the companies to maintain books of account for their cable television facilities separate from those for their common carrier services. The Commission has now developed a more detailed means of identifying cross-subsidization.

39. In *Report and Order* in CC Docket No. 86-111 (*Joint Cost Order*), 2 FCC Rcd 1298 (1987), *recon.* 2 FCC Rcd 6283 (1987), *petition for further recon. pending*, the Commission adopted a system of accounting separation designed to inhibit carriers from imposing costs and risks of nonregulated activities on ratepayers for regulated services. Its purpose in doing so is to protect ratepayers from unjust and unreasonable interstate rates through cross-subsidization, misallocation of joint and common costs and improper intracorporate transfer pricing. Thus, it adopted:

> (1) cost allocation standards and, for certain carriers, a requirement that a cost allocation manual be filed with this Commission; (2) rules for recording transactions between regulated telephone companies and their corporate affiliates; and (3) accounting procedures, audit requirements, and other implementation and enforcement mechanisms.

2 FCC Rcd at 1299. The cost allocation standards, which are based on a fully distributed costing methodology, require, to the extent possible, costs to be directly assigned either to regulated or unregulated activities.[36] Rules relating to transactions between carriers and their affiliates require recordation at market prices, if the price is available from a price list or tariff. In order to assure that proper recording of valuation of services provided to or by a non-regulated affiliate occurs, the Commission decided that the cost involved "must be apportioned in a manner that complies with the standards and procedures for the apportionment of joint or common costs between the regulated and nonregulated operations of the carrier entity."[37] To meet its objective, the Commission decided it was necessary to apply the cost allocation standards and affiliate transaction rules to all local exchange carriers (LECs) and dominant interexchange carriers. However, it concluded that only Tier I LECs[38] need to file and obtain approval of their cost allocation manuals; perform an annual independent audit, and comply with certain interim reporting requirements. Because General is a Tier I carrier, we will expect General to follow the accounting methodologies adopted in the *Joint Cost Order* for Tier I LECs, *i. e.*, Parts 32 and 64 of the rules, 47 C.F.R. Parts 32 and 64, and to treat all costs associated with the Cerritos project as unregulated activity costs. Our intention is to assure that any short-fall in recovery of General's investment will be borne by its stockholders.

40. We are also concerned that facility lease payments from GTE to General could represent expenses which GTE in whole or part assigns to its affiliated basic exchange telephone companies, *e. g.*, research and development costs. General has stated that it will not engage in cross-subsidization because, *inter alia*, its costs "will be recovered fairly and ratably from the cost-causers." Para. 9, *supra*. It also has stated that it will separately account for expenses, investments and revenues associated with the construction, maintenance and provision of the cable facilities. To assure that no component of costs associated with the subject project is assigned to any ratepayer, we will include a condition to this grant stating that no cost for the construction or operation of the Cerritos cable system, including lease payments by GTE, shall appear in any General/GTE rate base or as an operating expense, absent prior authority from this Commission.

41. Other issues have been raised concerning the part of General's proposed system that will be leased by GTE. General has emphasized that the capacity is intended to serve as a research and testing facility. During one phase of testing, GTE will employ the video signals of Apollo, providing Apollo alternative routing to make comparative analyses of the quality of video signals carried by coaxial facilities versus those transported by fiber optic facilities (which will also be constructed, but for which authorization has not yet been sought). In another phase, GTE plans a technical evaluation of the coaxial facilities' ability to perform video-on-demand functions, *i. e.*, the ability to order and supply video, interactive video and voice services. We are interested in monitoring the progress in the facility and service technologies derived from these experiments. Accordingly, we shall condition this authorization to require General/GTE to submit periodic reports on its technical progress. The parties disagree as to the regulatory meaning of video-on-demand service and the extent to which provision of that service, even on a limited trial basis, is foreclosed by the cross-ownership prohibition. Because we have decided, for the reasons mentioned above, to waive that prohibition here, we need not address issues relating to the proper regulatory classification of video-on-demand services.

## IV. CONCLUSION

42. We have considered the arguments presented in this proceeding and find that the public convenience and necessity will be served by grant of the application and waiver of our telephone/cable television cross-ownership rules.[39] We find that for purposes of the Cable Act and our rules, absent the subject proposal cable television service as specified in the RFP could not exist in Cerritos. In order to assure that any cross-subsidization between General and its customers, Apollo and GTE, is readily revealed, we will require General to follow the accounting rules adopted in CC Docket No. 86-111. No costs associated with the construction, operation or use of the Cerritos cable system shall appear in any General/GTE service rate base or as a regulated expense without prior authority from this Commission. We will authorize GTE to conduct tests, and we will require General/GTE to submit annual reports on the progress of those tests and experiments.

## V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, that Sections 63.54 and 63.55 of our rules ARE HEREBY WAIVED to permit General Telephone Company of California to construct and maintain the broadband coaxial cable transport facilities described in para. 1, *supra*.

44. IT IS FURTHER ORDERED, that the application of General Telephone Company of California for authorization under Section 214 of the Communications Act of 1934, as amended, to construct, operate and maintain cable television distribution facilities in Cerritos, California, IS GRANTED.

45. IT IS FURTHER ORDERED, that grant of the application provided for herein IS SUBJECT TO the following conditions:

a. That no costs associated with the construction, operation or use of the Cerritos cable system shall appear in any General/GTE service rate base or as a regulated expense without prior authority from this Commission.

b. General/GTE shall submit to the Chief, Domestic Services Branch, Common Carrier Bureau on March 31, 1989, and on that date of each year thereafter for the previous calendar year, a comprehensive written report discussing the following matters, in the order designated:

(1) Construction progress;

(2) Total number of hours of operation of the Cerritos system and the amount of bandwidth employed by all users;

(3) For uses by GTE, a discussion of all uses made including tests conducted, the purposes of the tests, the type, the conclusions reached, and copies of any publicly available discussions of GTE's use of the Cerritos cable facilities of which General is aware.

46. IT IS FURTHER ORDERED, that CCTA and NCTA's Petitions to Deny ARE DENIED.

47. This Order is issued under Section 0.291 of the Commission's rules and is effective upon its release. Failure of General Telephone Company of California to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

## FOOTNOTES

[1] The fiber optic cable system referenced in the application is not a part of this proposal. General states in its application that it will maintain, separate from the accounts for telephone facilities, specific records for all expenses, investments and revenues associated with the construction, maintenance and provision of the proposed coaxial facilities, in order that the construction and operation of the proposed facilities are not subsidized by revenues from its other common carrier services. Application, p. 8.

[2] These rules provide generally that a telephone common carrier may not engage in the provision of, or be affiliated with, the provider of video programming in the carrier's telephone service area.

[3] In its July 20, 1987 amendment, General discloses that it has a similar payment deferral agreement with GTE.

[4] Section 621(b)(1) of the Cable Communications Policy Act of 1984 (Cable Act).

[5] Pacific Bell, Inc., Application File No. W-P-C-5384, (Letter from Chief, Domestic Facilities Division, Common Carrier Bureau, to Director, Federal Relations, Pacific Bell, October 29, 1984).

[6] The affidavit General provided from Thomas L. Robak explains that the $750,000 is Robak's profit for constructing the proposed coaxial system and that Thomas Robak insisted that the money be paid prior to start of construction, in part, because he had other expenses unrelated to this project.

[7] Also before us are General's motion for leave to file additional comments in Opposition filed May 18, 1987, CCTA's Motion for Leave to File Comments in Reply filed June 10, 1987, General's Motion to Strike filed June 18, 1987 and CCTA's Opposition to Motion to Strike filed June 30, 1987. NCTA filed a Further Motion to Dismiss and Response of NCTA on August 5, 1987; CCTA filed an Amended Petition to Deny and Response on August 5, 1987; General filed a Reply on August 18, 1987; NCTA filed a Reply on September 4, 1987; and GTE submitted a letter on September 16, 1987. Because General's Motion for Leave to File Additional Comments and CCTA's Reply presented new matters for consideration, and did not delay the resolution of this proceeding, their motions are granted. The other pleadings will be treated as informal comments. *Cf.* 47 C.F.R. § 21.30(b). All pleadings and arguments have been considered in this proceeding.

[8] The pertinent section of that lease reads as follows:

1. The Coaxial Facilities Capacity. The Owner agrees to lease and the Lessee agrees to rent, subject to Lessee's relinquishment of any of its bandwidth capacity, from the Owner 275 MHz of bandwidth capacity for the use of Lessee in testing technology and services in the City . . . .

2. . . . if Lessee shall relinquish any of its bandwidth capacity, there shall be a pro-rata reduction of the rent.

GTE July 20, 1987 Amendment, Appendix Two, pp. 1 and 2.

[9] *Id.* at Appendix Three.

[10] According to NCTA, video-on-demand is a form of video programming and clearly is a cable service. NCTA Petition at p. 7.

[11] *See* GTE's *ex parte* submission of February 3, 1988 which included a copy of a recent GTE presentation at the Western Cable Show. The presentation described four phases of planned technological testing and new service development for GTE's proposed broadband system: Phase I is deployment to home customers, Phase II introduces interactive video services, Phase III utilizes video on demand technology, and Phase IV describes switched video service.

[12] As to General's assertion that CCTA and NCTA are without standing to participate in this proceeding, we believe that given the background and purposes of the cross-ownership rules, the interests of the members of CCTA and NCTA are affected by the policy determinations we make in response to issues raised. We conclude that the broad potential applicability of these determinations to these associations is sufficient to find a nexus and thus standing. *See* Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D. Tenn 1970) *rev' d on other grounds*, 401 U.S. 402 (1971); Sierra Club v. Hinkel, 433 F.2d 29 (9th Cir. 1970); 5 U.S.C. § 702.

[13] The Section 214 application process also serves as a vehicle for examining compliance with the Part 63 cross-ownership rules.

[14] The Commission's rules do not prohibit telephone companies from constructing, in their telephone service areas, facilities to be used by others to provide cable television service. Interstate "channel service," however, is subject to certain conditions: (1) that the telephone company demonstrate that the independent channel service customer, prior to seeking a franchise, had available to it pole and/or conduit space rights at reasonable rates and without undue restrictions; and (2) that the franchising body was aware of this policy. *See* 47 C.F.R. § 63.57.

[15] In addition to Section 63.56, Section 63.58, 47 C.F.R. § 63.58, provides for a "rural area" exemption from this cross-ownership restriction for areas with populations of 2,500 or fewer persons. *See* Amendment of Commission's Rules to Implement Provision of Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637 (May 2, 1985). Cerritos does not qualify as a rural area because its population exceeds 2,500 persons.

[16] Comments were filed by CCTA, Colony Communications, Inc. (Colony), GTE, NCTA, National Telephone Cooperative Association (NTCA) and United States Telephone Association (USTA). Replies were filed by American Cablesystems of California, Inc. (ACC), CCTA, Colony, Comcast Cablevision of North Orange, Inc. (Comcast), GTE and NCTA.

[17] Citations for these cases, not offered by CCTA, are, respectively: Order, No. C-85-2168, City of Palo Alto v. Century Federal and United States of America, *petition for cert. filed*, 56 U.S.L.W. 3511 (U.S. Jan. 2, 1988) (No. 87-946); and 669 F.Supp. 964 (1987).

[18] General cites Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir.), remanded July 31, 1987, 824 F.2d 1205 (1987), for support of this point. The Commission's orders in the underlying proceeding to the contrary (reported at 100 FCC 2d 1244, 103 FCC 2d 600 and 104 FCC 2d 451 (1985)) have neither been stayed nor vacated by the court but merely remanded for clarification in certain limited respects.

[19] Two Apollo options were: (1) Apollo would build, own and operate the system for the City, obtaining financing through capitalization or a limited partnership offering. The City Manager concluded that this "bare bones" system "would be outdated before it went into the ground."; (2) Apollo would take an equity interest in a City-financed, built and owned system, with Robak providing necessary construction and management. According to the City Manager, "[t]his alternative would guarantee the enhancements the City wants but would require significant tax dollars to undertake the project." The third option, by which Apollo and General would enter into a joint venture, was favored because it did not contain the defects of the other two options, yet it offered an advanced system with the range of features the City sought. *See* Report, p. 8.

[20] General states that any otherwise prohibited programming service would be offered through an independent operator such as Apollo.

[21] Memorandum Opinion and Order, 86 FCC 2d 36 (1981).

[22] ACC notes that Cerritos requires a wholly underground cable system, which ACC estimates costs about $60,000/mile, versus $15,000/mile for aerial plant. It suggests that a responsible plan would require "tradeoffs" to prevent extremely high rates or cross-subsidies. We note that Cerritos' other utilities are already underground.

[23] We note that Buena Park is just to the east of Cerritos.

[24] Comcast further states that on June 1, 1987, it acquired ownership of the cable systems at Fullerton, Placenta and Buena Park from Group W Cable, Inc. It notes that Group W did not participate in the franchise process "because it could not foresee a reasonable return on its investment" in the required system and because it was unwilling to submit an application for a franchise which met the RFP standards "with the intention of 'negotiating out these elements of the proposal which were not financially viable.'" Comcast Waiver Reply, p. 2.

[25] This issue is moot in view of General's reply comments, which constitute its waiver filing.

[26] Erie Telecommunications v. City of Erie, 659 F.Supp. 580 (W.D. Pa., 1987), appeal pending (3rd Cir., Case No. 87-3648).

[27] 130 Cong. Rec. H.10445 (Oct. 1, 1984).

[28] "Demonstrate", Webster's New Collegiate Dictionary, 1977 ed.

[29] *See* Mayor of Cerritos' letter detailing the City's process to construct and operate a cable television system. Some 70 cable operators and suppliers were sent requests for proposals. Advertisements were placed in leading trade publications. Two extensions of time were granted. The City negotiated with Apollo and General the proposal now before the Commission. The Mayor concludes: "It is our feeling that there appears to be no other viable option for providing service to our residents." *See also* GTE letter to Chief, Domestic Facilities Division, July 17, 1987, p. 3, which states that "General took the situation as it found it . . . . That situation envisioned Robak constructing the system for Apollo." *See* also General Reply (August 18), p. 9.

[30] Even before the passage of the Cable Act, the Commission was disinclined to second guess or challenge local franchise decisions. *See* , *e. g.*, Plum Cable Television, 36 Rad. Reg. 2d 599 (1976); Cape Cod Cablevision Co., 60 FCC 2d 173 (1976); Blue Ridge Cable Television, Inc., 58 FCC 2d 8 (1976); Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television Cross Ownership Rules, 82 FCC 2d 233, 244 (1980); Shenandoah, *supra*. *See also* Report and Order in MM Docket No. 84-1296, 50 Fed. Reg. 18,637 (May 2, 1985), at para. 77.

[31] 130 Cong. Rec. H.10444, Congressman Bryant: "Most importantly, H.R. 4103 establishes the authority of local governments to regulate cable franchises. I think beyond question the cities do

not have to fear continuous court challenges to this authority. I believe both sides in the process, the cities and the cable operators, came out in good shape."

[32] CCTA's references to Century Federal Inc. v. City of Palo Alto and Group W Cable v. City of Santa Cruz do not alter our analysis of this issues. The law is not settled on the issues raised in those cases. As GTE notes, they are Northern District Court decisions, whereas Cerritos lies in the Southern District of California. Moreover, there is a conflicting decision in another District Court, *viz.*, Erie Telecommunications v. City of Erie, 659 F.Supp. 580 (W.D. Pa., 1987). Furthermore, we do not believe that the constitutionality of the Cerritos franchise process is an issue that should be decided by the Commission in the first instance in the context of ruling on a request for waiver of its cable-telephone cross-ownership rules. The more appropriate means to resolve this issue would be through litigation in court. In connection with the franchise process, CCTA in effect asks us to resolve an issue which no cable company chose to litigate at that time: the constitutionality of the RFP. In the absence of a definitive court ruling as to the constitutionality of the provisions contained in the Cerritos RFP, we assume for purposes of this decision that the RFP and the process by which the franchise was awarded are valid.

[33] GTE believes the information to be gained from tests associated with its use of 275 MHz of capacity on the system will be of substantial value.

[34] We are granting this waiver on the basis of General's showing that cable video programming service in Cerritos is infeasible absent the General-Apollo affiliation. Statements that involvement of the telephone company in the provision of cable service would offer certain general advantages is not sufficient justification for grant of a waiver.

[35] We believe that by the conditions we impose in this authorization any improper assignment of costs or revenues will become apparent and cross-subsidization by telephone ratepayers will be avoided.

[36] "All activities that are classified as common carrier communications for Title II purposes will be classified as regulated activities for purposes of our accounting rules and nonregulated activity cost allocation rules. Most activities that are not classified as common carrier communications services for Title II purposes will be classified as nonregulated activities." *Id.* at 1307.

[37] *Id.* at 1336.

[38] Tier I companies are LECs that earn more than $100 million in total company regulated annual revenues. *Id.* at 1349, n. 70.

[39] Petitioners contend an illustrative tariff must be submitted. Our finding of General's involvement as an affiliate of a cable operator renders the filing moot.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Public Service Company of Oklahoma
Request for Declaratory Ruling

**DECLARATORY RULING**

**Adopted: April 13, 1988; Released: April 22, 1988**

By the Chief, Private Radio Bureau:

1. The Private Radio Bureau has before it a request for declaratory ruling filed by Public Service Company of Oklahoma (PSO) on August 7, 1987. PSO asks us to find that its hybrid fiber optic/microwave network is a private carrier system, within the meaning of the Commission's *First Report and Order* in PR Docket No. 83-426 (First Report and Order).[1] PSO further seeks confirmation that, as a private carrier, it may lease excess capacity on its hybrid fiber optic/microwave system to Part 94 eligibles free of state entry and rate regulation. In opposition, the Oklahoma Corporation Commission (OCC), Southwestern Bell Telephone Company (SWB) and General Telephone Company of the Southwest (General) contend that the relief PSO seeks is premature and would unlawfully encroach upon state jurisdiction over wholly intrastate communications service offerings. We conclude that if PSO's operations are consistent with its representations, lease of excess capacity on PSO's hybrid fiber optic/microwave system would constitute private carriage. The Commission has determined that the policy goals that led it to authorize private carrier service offerings would be frustrated by state entry and rate regulation and has, therefore, preempted such regulation.[2]

## I. BACKGROUND

2. PSO, a Private Operational-Fixed Service (OFS) licensee, operates an interstate microwave network. The network's backbone system is 800 miles long and incorporates multiple stations extending from Vernon, Texas to Bartlesville, Oklahoma. To increase communications capacity and promote spectrum efficiency, PSO is in the process of integrating fiber optic circuits into the backbone system at Lawton, Bartlesville and Tulsa, Oklahoma. PSO represents that, at present, its network primarily serves the internal communications needs of PSO's electric utility business. PSO has sufficient excess capacity to accommodate other compatible Part 94 eligibles [3] on its system. PSO has therefore undertaken to lease its excess capacity on a commercial basis.[4]

3. PSO represents that it leases bulk capacity on its hybrid network to entities for internal communications needs. Other PSO customers will use the hybrid network for point-to-point communications or for access to an interexchange carrier point-of-presence. According to PSO, each lease agreement is individually negotiated and tailored to meet the customer's particular communications requirements. PSO expects that a combination of fiber and microwave circuits will carry most of the system's traffic. PSO indicates that it will play no role in the switching or re-routing of system traffic originating from lessees.[5]

4. PSO also states that it selects its customers on the basis of over-all compatibility between their proposed operations and those of PSO and other system users. PSO represents that it is now leasing, pursuant to a signed agreement, approximately thirty channels of its system to a gas pipeline company for voice and data communications. A petroleum company and a car rental agency have also provided PSO with letters of intent, expressing their interest in leasing excess capacity to connect with an interexchange carrier point-of-presence. Other potential customers include banks, insurance companies, local governments, hospitals and public utilities. The initial lease term is typically three to five years, with an option to renew the agreement.[6]

5. On June 20, 1986, PSO sought a declaratory ruling from this agency that its proposed hybrid system was the type of private system contemplated in the *First Report and Order* and, therefore, that state entry and rate jurisdiction over its planned operations had been preempted. SWB opposed PSO's request. In response, the Bureau issued a letter on March 11, 1987,[7] declaring that if PSO were to implement its system in accordance with its representations, it would be engaging in private carriage as envisioned in the *First Report and Order*.

6. On July 17, 1987, SWB and other local exchange carriers certified to provide common carrier service in Oklahoma filed a complaint against PSO with the OCC.[8] The complaint alleges that PSO is offering uncertificated intraLATA telephone service to the public, and seeks an order prohibiting PSO from continuing to offer its service.

7. On September 29, 1987, the OCC issued thirty-four data requests to PSO. In a letter transmitting the data requests, the OCC requested a timely response from PSO in order to expedite resolution of the complaint before it.[9] On November 16, 1987, the OCC reiterated its expectation that PSO will respond to the data requests.[10]

## II. THE PLEADINGS

8. On August 7, 1987, PSO filed a second request for a declaratory ruling. PSO represents that in reliance upon the *First Report and Order* and Opinion Letter, it has continued to develop its hybrid system, and that system is now operational. Furthermore, it argues that the complaint pending before the OCC has dissuaded potential customers from contracting with PSO for private carrier service. In light of these developments, PSO urges that a conclusive determination of PSO's regulatory status and the Commission's jurisdiction over its private communications operations is both timely and necessary. Without such a determination, PSO states that the viability of its private carrier offering will be jeopardized. PSO argues that it is leasing excess capacity on its hybrid system as a private carrier pursuant to the *First Report and Order* and the guidelines set forth in *NARUC I*.[11] PSO further asserts that this Commission has exclusive jurisdiction over PSO's private carrier operations.[12]

9. The OCC[13], SWB and General oppose issuance of a declaratory ruling as premature and unwarranted. They contend, contrary to PSO's representations, that PSO's system continues to evolve and the OCC has yet to issue a decision that would thwart the system's development. If

the OCC were to impede PSO's interstate operations, SWB and General maintain that PSO could then renew its efforts to seek relief from this Commission.[14]

10. SWB, OCC and General further maintain that the relief PSO requests is at odds with the Commission's *Declaratory Ruling in the Matter of NorLight*.[15] General and the OCC interpret *NorLight* to confirm state authority to regulate PSO's purely intrastate fiber optic operations. SWB interprets *NorLight* to allow preemption only of state action that would unreasonably interfere with PSO's interstate private carrier operations.[16] According to SWB, no legitimate federal interests would be affected by a state investigation into PSO's regulatory status.[17]

11. Addressing the merits of PSO's request, SWB urges that there are insufficient facts to find PSO a private carrier and that the OCC should be permitted to investigate this issue. In support thereof, SWB asserts that PSO is a common carrier because its services duplicate those offered by interexchange carriers, PSO customers transmit intelligence of their own design and choosing,[18] and that PSO may offer some services indiscriminately.[19] Furthermore, SWB contends that *California v. FCC* [20] precludes this Commission from preempting state entry and rate regulation of PSO's service to the extent that PSO is operating as an intrastate common carrier. According to SWB, if the Bureau grants PSO's request, such broad preemptive action would give rise to unregulated carriers competing against highly regulated local exchange carriers for a share of the same market.[21] SWB finally asserts that even if the Bureau finds that PSO is operating as a private carrier pursuant to the *FirstReport and Order* and *NARUC I*, these decisions are superseded by *Louisiana Public Service Commission v. FCC*.[22] SWB interprets *Louisiana* to uphold state authority to regulate all intrastate services, including those offered by private carriers.[23]

12. In reply, PSO reiterates that a refusal to issue a declaratory ruling could have a chilling effect on the further development of spectrally efficient private hybrid fiber optic/microwave systems. PSO argues that if the state proceedings go forward, use of its private system will be needlessly delayed. Affirming its private carrier status, PSO contends that SWB and General misinterpret *NorLight* and reargue issues already disposed of in the *First Report and Order*.[24]

13. At the Bureau's request, PSO supplied us with information regarding existing system users and the feasibility of segregating intrastate aspects of its service offering. PSO provided us with a lease agreement and a description of PSO's existing and potential clientele, as well as description of available service options, contract terms and system configuration.[25] Also at our request, SWB supplied us with all facts in its possession substantiating its claims that PSO is not operating as a private carrier.[26] In addition, the parties supplemented the record with a number of written and oral *ex parte* presentations addressing the factual and legal issues raised by PSO's service offering.[27] None of these subsequent pleadings altered the factual and legal issues before the Bureau.

## III. DISCUSSION

### A. Procedural Matters

14. Based on the record before us, we find that it is appropriate to issue a declaratory ruling at this time to bring certainty to these issues. In the *First Report and Order*, the Commission determined that private carrier microwave service provides Part 94 eligibles with a low-cost alternative to common carrier service for satisfying their specialized communications needs.[28] Private carriers, particularly those that integrate fiber optic circuits into their systems, promote efficient and effective spectrum utilization. Use of fiber optic technology conserves radio spectrum, which is scarce, especially in urban areas. The Commission therefore has a strong interest in encouraging substitution of fiber for microwave wherever feasible and, thus, the growth and development of hybrid fiber optic/microwave service offerings.

15. PSO represents that the continuing controversy regarding its regulatory status has impaired its ability to serve existing and potential users. PSO's stated concern is the chilling effect its uncertain regulatory status has had on its efforts to attract customers. Resolving that issue does not require us to determine the actual facts regarding what service PSO may have offered in the past. Instead, our declaratory ruling assumes that PSO is now operating its system in conformance with its representations. We believe that such a prolonged proceeding can be detrimental to developing a customer base. We therefore find this controversy can be properly resolved by declaratory ruling. Absent such a ruling, PSO indicates that its continuing ability to make its private carrier service available in the State of Oklahoma will be threatened. In the interest of resolving an apparent uncertainty that has impeded introduction of service, we take this opportunity to clarify the regulatory and jurisdictional aspects of private hybrid systems.[29]

### B. Private Carrier Status

16. *NARUC I* sets forth a test of common carriage for communications services. There, the court found that a common carrier engages in an indifferent holding out of services to the public either by obligation or choice. In contrast, private carriers make individualized decisions regarding the terms and conditions of their service offerings. Generally, private carriers also contract with a relatively stable clientele on a medium-to-long- term basis to fulfill specialized communications needs.[30]

17. Guided by *NARUC I*, the Commission's *First Report and Order* authorized private carriers to provide microwave service to others for profit.[31] As part of this determination, the Commission observed that a microwave carrier leasing excess capacity would have a unique incentive to select its clientele carefully: "the personal and operational compatibility of a given applicant with respect to the [Operational Fixed Service] system as a whole and other users will be one of the foremost considerations when a private carrier determines to make its system available to additional users. A private carrier would not be able, as a matter of practice, to hold itself out without jeopardizing the system reliability and operational security essential to effective microwave communications."[32]

18. PSO states that each of its lease agreements is individually negotiated and tailored to meet the user's particular communications needs. The PSO lease agreement also represents a medium-to-long-term commitment to serve a stable group of business, special industrial, local governmental, petroleum and utility entities. We find that a hybrid microwave system operated as PSO has described its system would be within the private carrier definition stated in *NARUC I* and the *First Report and Order*. This conclusion is consistent with the recent decisions in *Nor-*

*Light* and *Invescom*. In *NorLight* the Commission found that lease by a utility of excess capacity on a interstate fiber optic system was a private carrier offering. Similarly, in *Invescom* we found that where an operational fixed service licensee proposed to engage in commercial leasing of capacity on its intrastate microwave system to eligible users, the licensee was also offering private carrier service. In both *NorLight* and *Invescom*, it was concluded that each licensee's proposal to negotiate individually tailored contracts with a long-term, stable clientele established private carrier status. In this respect, the service offering that PSO describes is structured similarly to those discussed in *NorLight* and *Invescom*.

19. After evaluating the record now before us, we find no support for SWB's claim that PSO will indifferently serve the public. No facts have been presented that would undermine PSO's representations that it will have individualized dealings with its clientele. As was the case in *NorLight*, PSO represents that preservation of a reliable communications system is essential to the efficient functioning of its electric utility business. Thus, it is evident that PSO would select its customers carefully to be assured that the communications requirements of all system users can be accommodated without interfering with PSO's internal communications needs.

20. There is also no merit in SWB's argument that PSO offers common carrier service because, pursuant to the *NARUC II* test, PSO's customers transmit intelligence of their own design and choosing.[33] This argument was fully addressed and rejected in the *First Report and Order*. There, the Commission found that unless a carrier holds out its services to the public in an indifferent, nondiscriminatory manner, the fact that the customer selects transmission content does not alone establish common carrier status.[34]

21. We also cannot accept SWB's contention that PSO is a common carrier because it provides a service similar to local exchange service. In *NARUC I*, the Court rejected any suggestion that a service must be characterized as common carriage if it is substitutable for common carrier service.[35] The possibility that existing customers of local exchange carriers may choose to obtain service from PSO that is similar to some services offered by local exchange carriers has no bearing upon our determination that PSO is a private carrier. As discussed in the *First Report and Order*, the Commission fully expects that in certain instances, private and common carriers could serve the same customers. The Commission also determined, however, that operational fixed service systems have served as an important alternative to common carrier service offerings for over thirty years. Those users eligible to receive private carrier service from PSO would also be eligible to construct and operate their own operational fixed systems. PSO's service offering simply increases the number of users of private microwave/hybrid systems thus enabling greater numbers of Part 94 eligibles to satisfy their specialized communications needs.[36]

### C. Preemption of State Entry and Rate Regulation

22. PSO seeks confirmation that the *First Report and Order* preempts state entry and rate regulation of private hybrid system operations. Absent preemption, PSO argues, this agency's stated intention to encourage fiber optic enhancement of existing microwave systems would be undermined. SWB contends that the *Louisiana* and *California* decisions preclude exercise of the Commission's preemptive authority. The OCC, General and SWB also argue that the Commission's decision in *NorLight* evidences an unwillingness to preempt state regulation of intrastate private carrier service offerings. The OCC, SWB and General assert that hearings before the OCC should go forward to determine whether and on what basis PSO can continue to provide its service.

23. We confirm that the *First Report and Order* preempts state entry and rate regulation of private hybrid microwave systems. In the *First Report and Order*, the Commission recognized that for-profit leasing of excess capacity on private hybrid microwave systems would create a new source of low- cost, efficient and reliable communications. The Commission also found that the new private carrier service would meet the communications requirements of eligible users on a national basis, and would not carry only intrastate traffic. Based on these findings, the Commission concluded that state entry and rate regulation of this new service offering would conflict with its statutory mandate to promote spectrum efficiency and to facilitate introduction of new communications services. Consequently, the Commission exercised its preemptive authority.[37]

24. Titles I and III of the Communications Act of 1934 empower the Commission to recognize PSO as a private carrier and to preempt inconsistent state regulation.[38] To find otherwise would impede development of a uniform system of regulation for Commission licensees. Having determined that PSO is a private carrier, we conclude, based on the Commission's decision in the *First Report and Order*, that the State of Oklahoma is without authority to impose entry and rate regulation, whether directly or indirectly, upon this hybrid fiber telecommunications service offering.

25. Contrary to SWB's assertions, the Commission's authority to preempt state entry and rate regulation of private microwave carriers is not undermined by the *Louisiana* and *California* decisions. Both decisions interpret Section 2(b) of the Act, 47 U.S.C. § 152(b), which reserves for the states jurisdiction over "charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communication service by wire or radio of any carrier." The term "carrier," however, is defined by Section 3(h) of the Act, 47 U.S.C. § 153(h) as a common carrier. Thus, Section 2(b) is not a limitation on the scope of the Commission's jurisdiction over private carriers.[39]

26. The reliance of the OCC, SWB and General on *NorLight* is equally misplaced. In *NorLight*, *supra*, the Commission determined that state regulations conflicting with the FCC's jurisdiction over interstate fiber optic communications services were invalid. The Commission's preemption discussion addressed only the first, or fiber optic, phase of NorLight's interstate system, and state regulation that would have directly affected the transmission of interstate traffic. In doing so, the Commission found it unnecessary to decide the scope of its authority over any incidental, intrastate fiber optic traffic that might be carried on the system and deferred to state regulation of such services.[40] In contrast, PSO's system utilizes both microwave and fiber optics. The Commission's *First Report and Order* recognized that, pursuant to Section 301 of the Act, all non-common carrier radio services are deemed to be interstate services over which the Commission may exercise jurisdiction. *See First Report and Order* at n. 50. The Commission therefore preempted all state entry and

rate regulation of private microwave communications systems, including those that use a combination of private microwave and private fiber optic links. *Id.* at 1506. Accordingly, this matter is governed not by *NorLight*, which related to a fiber-only system, but by the *First Report and Order*, which related to a hybrid fiber/microwave system. As we did not in *NorLight*, *supra*, neither do we here reach the question of jurisdiction over purely intrastate fiber optic operations.[41]

## IV. CONCLUSION

27. We conclude that PSO's hybrid microwave operation, as represented by PSO, constitutes private carriage, consistent with the *First Report and Order*, and is therefore not subject to state entry and rate regulation. Accordingly, the request for declaratory ruling filed by PSO is GRANTED to the extent indicated above and otherwise is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

## FOOTNOTES

[1] 50 Fed. Reg. 13,338 (April 4, 1985).

[2] *Id.* paras. 63-67.

[3] *See* 47 C.F.R. § 94.5. Part 94 eligibles are those entities eligible for licensing in a radio service under Parts 80, 87 or 90 of the Rules, or a third party proposing to provide service to these entities.

[4] Request for Declaratory Ruling (Request) at 2-3; PSO's Written *Ex Parte* Presentation of September 23, 1987 at 1-2; Reply of PSO at 29-30.

[5] Request at 13-19; Reply of PSO at 9-12 and 29-32.

[6] PSO's Written *Ex Parte* Presentations of September 23rd and October 14th 1987.

[7] Letter from Chief, Private Radio Bureau to PSO of March 11, 1987, (Opinion Letter).

[8] Cause No. PUD 000415. Alltel Oklahoma Inc., Oklahoma Alltel, Inc. and Oklahoma Communications Systems Inc. joined in the Complaint. General and the Oklahoma Rural Telephone Coalition have intervened on behalf of the complainants.

[9] PSO's Written *Ex Parte* Presentations of October 2, 1987 and October 5, 1987.

[10] We have also received Motorola's Response in Support of PSO's Request for Declaratory Ruling, filed August 27, 1987; Comments of Oklahoma Communications Systems. Inc. (OCSI) On the Request for Declaratory Ruling of PSO, filed September 10, 1987; and Motion in Opposition to SWB's Request to file an Additional Pleading, filed December 1, 1987 by the Fiber Optic Legal/Regulatory Task Force of the Utilities Telecommunications Council (FOL/RTF). SWB filed an Opposition to acceptance of Motorola's and FOL/RTF's pleadings and PSO filed a motion to strike the OCSI comments. The Motorola, OCSI and FOL/RTF comments are essentially repetitive of other pleadings in this proceeding.

[11] National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*).

[12] Request at 7-9 and 17-35.

[13] The OCC submitted its comments more than two months after the deadline for filing oppositions to PSO's Request. Nonetheless, in light of the OCC's unique interest in the outcome of this proceeding, we shall, pursuant to 47 C.F.R. § 1.45(c), consider the OCC pleading.

[14] Comments of the OCC at 3-5; Comments of General at 2-5; SWB's Opposition to PSO Supplemental Request for Declaratory Ruling at 2-4; SWB's Additional Factual Pleading in Opposition to PSO's Request for a Declaratory Ruling at 1-18; and SWB's Opposition to PSO's Motion for Expedited Review and Reply to Opposition of [sic], Additional Factual Pleading at 2-6.

[15] 2 FCC Rcd 132 (1987), *aff'd*, 2 FCC Rcd 5167 (1987) (*NorLight*), *appeal pending sub nom.*, Public Service Commission of Wisconsin v. FCC, Case No. 87- 1618, filed October 22, 1987 (D.C. Cir.).

[16] SWB's Opposition to PSO's Supplemental Request for Declaratory Ruling at 5-6.

[17] Southwestern Bell Telephone Company's Opposition to Public Service Company of Oklahoma Supplemental Request for Declaratory Ruling at 2-4; Southwestern Bell Telephone Company's Additional Factual Pleading in Opposition to Public Service Company's Request for a Declaratory Ruling at 1-18; Southwestern Bell Telephone Company's Opposition to Public Service Company of Oklahoma's Motion for Expedited Review and Reply to Opposition of Additional Factual Pleading at 2-6.

[18] NARUC v. FCC, 533 F.2d 601, 608-610 (D.C. Cir. 1976).

[19] SWB's Opposition to Public Service Company of Oklahoma Supplemental Request for Declaratory Ruling at 5-6.

[20] 798 F.2d 1515 (D.C. Cir. 1986)(*California*).

[21] SWB's Opposition to PSO's Supplemental Request for Declaratory Ruling at 6-8.

[22] 106 S. Ct. 1980 (1986)(*Louisiana*).

[23] SWB's Opposition to PSO's Supplemental Request for Declaratory Ruling at 8-10.

[24] Reply of PSO at 3-8 and 13-22; Supplemental Reply of PSO.

[25] PSO's Written *ExParte* Presentations of September 23, 1987 and October 14, 1987.

[26] SWB's Additional Factual Pleading in Opposition to Public Service Company's Request for a Declaratory Ruling. SWB's pleading consisted of unsubstantiated allegations. PSO's Motion for Expedited Ruling and Opposition to SWB's Additional Factual Pleading neither confirmed nor denied the allegations SWB raised.

[27] *See* , *e. g.*, PSO's Written *Ex Parte* Presentation of October 13, 1987 and SWB's Written *Ex Parte* Presentation of December 17, 1987.

[28] *First Report and Order*, paras. 50, 61.

[29] A declaratory ruling is, of necessity, limited to "terminatinga controversy or removing an uncertainty." 47 C.F.R. § 1.2. Therefore, the subject of our ruling today is not whether PSO is, in fact, operating in compliance with the private carriage rules, as set forth in 47 C.F.R. § 94.17 and the *First Report and Order*. Compliance issues are properly resolved in the context of an investigation into a given licensee's operations. *See* , *e. g.*, General Telephone of the Southwest (*Invescom*) (released August 19, 1987), *recon. pending*. We have no motions pending before us to institute an investigation of PSO's operations, nor do we believe that the record supports intitiating such an investigation on our own motion at this time.

[30] NARUC I, 525 F.2d 630, 643.

[31] *First Report and Order*, para. 53; 47 C.F.R. § 94.17.

[32] First Report and Order, para. 54.

[33] NARUC v. FCC, 533 F.2d 601 (D.C. Cir. 1976)(NARUC II).

[34] First Report and Order, para. 57.

[35] NARUC I, 525 F.2d 642-643.

[36] First Report and Order, paras. 59-62.

[37] *See* generally First Report and Order, paras. 63-67.

[38] *See*, Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963); Jones v. Rath Packing Co., 430 U.S. 519 (1977) and Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984). *See* also Computer and Communications Industry Association v. FCC, 693 F.2d 198, 214-218 (D.C. Cir. 1982).

[39] *See* NARUC I, 525 F.2d at 646-647.

[40] The Commission noted that if state regulation of NorLight's intrastate fiber optic operations posed a significant impediment to the interstate system, the Commission could revisit the matter. *NorLight* at n. 38.

[41] Here, as in NorLight, the Commission's preemption of state regulation of hybrid microwave and fiber communicationssystems does not intrude upon the OCC's legitimate regulatory interest in and authority over PSO's electric utility service.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-181**

In re Applications of

| | |
|---|---|
| Roger Lonnquist and Scott Neader d/b/a LA CRESCENT COMMUNITY BROADCASTERS (hereafter La Crescent) | File No. BPH-870306KC |
| GWENDOLYN M. GUTZEL (hereafter Gutzel) | File No. BPH-870312MC |
| Kendall Durfey d/b/a STATELINE BROADCASTING (hereafter Stateline) | File No. BPH-870313MU |
| WHITE EAGLE BROADCASTING, INC. (hereafter WEBI) | File No. BPH-870313OC |
| STEVEN B. COURTS (hereafter Courts) | File No. BPH-870313MT (PREVIOUSLY DISMISSED) |

For a Construction Permit
for a New FM Station on
Channel 274A (102.7 MHz)
La Crescent, Minnesota

**HEARING DESIGNATION ORDER**

**Adopted: April 13, 1988; Released: April 22, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On November 2, 1987, Courts timely filed a petition for reconsideration under 47 C.F.R. § 1.106 wherein he challenged the staff's September 24, 1987 return of his application as unacceptable for filing and requested reinstatement on a *nunc pro tunc* basis. Courts' application had been returned after engineering study revealed a discrepancy between the location of the proposed site as plotted -- N Latitude 43' 47' 55" and W Longitude 91' 12' *05* " and the coordinates listed in his application at Section V-B, Item 4 and Section V-G, Item 1 -- N Latitude 43' 47' 55" and W Longitude 91' 12' *09* ". In his petition, Courts contends that the four-second discrepancy in west longitude constituted a "latent mistake of fact [which] did not render [his] application substantially incomplete and is wholly immaterial to its acceptability for filing." In support of this contention, Courts developed several arguments, which can be summarized as follows: that, to the extent the Commission's treatment of predesignation and post-designation amendments is disparate, the processing standards are arbitrary and capricious; that the Commission's action in the instant case is arbitrary and capricious in light of its having accepted for filing the applications of others similarly situated; and that the return of the instant application was erroneous because the discrepancy can be resolved "confidently and reliably, drawing upon the application as a whole."

3. Under the "hard look" doctrine instituted by the Commission in its *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), (*Report and Order*) a petition for reconsideration of a finding of untenderability will properly lie only when the petitioner can demonstrate that the application met *all* of the tenderability requirements at the close of the window-filing period. *See Report and Order*, 50 Fed. Reg. at 19,946; 47 C.F.R. § 1.106(d)(2). The "hard look" policy has served the public interest by reducing the number of hastily prepared, frivolous and speculative filings received during a period when the Commission is experiencing a large influx of FM applications. It has also streamlined processing procedures to make more efficient use of staff and other resources. *See , e. g., Anchor Broadcasting Limited Partnership*, 2 FCC Rcd 7051 (1987)(HDO); *Star Signal Corporation*, 1 FCC Rcd 450 (1986); *James C. Rogers, III*, 2 FCC Rcd 5536 (1987). The *Report and Order* provides in Appendix D the critical elements that are essential for staff processing in order to determine that an application is substantially complete. If any one of the elements described therein is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Furthermore, resubmission of such application with a curative amendment will not be considered for *nunc pro tunc* reacceptance.

4. Appendix D to the *Report and Order* specifically requires in its list of tenderability criteria that "the geographic coordinates, *to the nearest second*, of the proposed transmitter site must be provided." (Emphasis added). Accurate geographic coordinates are critical to processing the application. *See* 50 Fed. Reg. at 19,945. Furthermore, if the coordinates are provided but, "on the face of the application visibly incorrect or inconsistent," and the discrepancy cannot be resolved "within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19,946. The processing guidelines also provide that the discovery of such defects after initial review will result in return of that application as inadvertently accepted for tender. *Id.* at 19,946.

5. Based on the above rationale, we reject Courts' contentions. Under the processing standards adopted in MM Docket 84-750, *supra*, an applicant may not file a corrective amendment in response to a predesignation return for a tenderability defect. Thus, the cases Courts cites in support -- *Music Sound Radio, Inc.*, 102 FCC 2d 1356 (1986); *Family Broadcasting Group*, 93 FCC 2d 771 (1983); and *Brownsfield Broadcasting Corp.*, 88 FCC 2d 1054 (1982)-- are inapposite as they pertain to processing standards in effect *prior* to the adoption of the "hard look" doctrine discussed above. Moreover, Courts' argument that the processing standards adopted under MM

Docket 84-750 fail to distinguish tenderability from acceptability criteria to the prejudice of applicants is without merit. The processing guidelines anticipate that certain tenderability defects – such as faulty geographic coordinates – may not be detected until the application is studied for acceptability. Thus, Commission discovery of such defect *at any time during processing* does not preclude return of the application as inadvertently accepted for tender. *See Report and Order*, 50 Fed. Reg. at 19,946. Although the staff's September 24, 1987 return letter does not make clear that faulty coordinates are, in fact, a tenderability defect as opposed to an acceptability defect, the distinction is irrelevant because further study of the application was inappropriate upon the discovery of the faulty coordinates.

6. Courts further contends that if the staff had employed the nine-point formula outlined below, it could have determined the correct coordinates, "confidently and reliably" from the application as a whole:

> (i) The Commission would first note the coordinates as listed in Section V-B, Item 4 and V-G, Item 1;
>
> (ii) The Commission would second plot the coordinates of the transmitter site as depicted upon the topographic maps;
>
> (iii) The Commission would third discern that the coordinates as specified in Sections V-B and V-G do not agree by four seconds (approximately 296 feet) west longitude with the site as depicted on the topographic maps;
>
> (iv) The Commission fourth would undertake to derive the needed information or resolve the discrepancy, drawing on the application as a whole;
>
> (v) The Commission fifth would plot the coordinates as specified in Sections V-C[sic] and V-G onto the topographic maps;
>
> (vi) The Commission would sixth observe that the "coordinate" [sic] site is at an elevation different (lower) than the site depicted on the topographic maps;
>
> (vii) The Commission seventh would examine all material parameters within the application (e.g., Section V-B, Items 6 and 10, Section V-G, Item 5, and Exhibit EE-1 including Annex 1-3 and 8.2);
>
> (viii) The Commission would eighth discern that all of this data is in agreement with a transmitter site as depicted on the topographic maps and none of this data agrees with the "coordinate" site as specified in Sections V-C [sic] and V-G; and
>
> (ix) The Commission would ninth by deduction derive the information it needs and resolve the discrepancy. . . . Petition for Reconsideration at 10-11.

7. This argument is without merit. The staff, in fact, employed steps (i) through (iii), above, in performing its acceptability study on the application; the Commission's use of the remaining steps, however, did not produce a single set of reliable coordinates. Therefore, it could not be determined from the face of the application whether Courts proposed the plotted site or the site as given in the application. Because nothing else in the application suggested favoring one set of coordinates over the other, the resulting ambiguity undermined the validity of the site availability certification, whether the FAA approval was accurate, whether coverage of the community of license was obtained, and whether proper spacing was maintained to existing stations. Although Courts cites *Addison Broadcasting Company, Inc.*, 2 FCC Rcd 6358 (1987)(HDO)[1] and *ABCD Broadcasting Company*, 2 FCC Rcd 6551 (1987)(HDO), as instances where the Commission has accepted for filing applications proposing faulty coordinates, those cases are distinguishable. In *Addison Broadcasting, supra*, the staff was able to resolve a discrepancy between the coordinates specified and the accepted coordinates for a tower solely because the applicant proposed utilizing an *existing* facility, the coordinates of which were on record with the Commission, and which fact was referred to in the application itself. Unlike the present case, the staff was able to conclude in that instance which set of coordinates was erroneous. Furthermore, in the present case, Courts nowhere indicated that he intended to utilize an existing tower site. Contrary to Courts' assertion, the approach taken in *Addison Broadcasting* has been uniformly applied. *See Rayne Broadcasting Company, Inc.*, 3 FCC Rcd (1988)(HDO); *Coffey Broadcasting*, 2 FCC Rcd 3524 (1988)(HDO). *See also Carta Corporation*, 3 FCC Rcd 798 (1988)(HDO). In light of the foregoing, Courts has failed to demonstrate under 47 C.F.R. § 1.106 that the staff's September 24, 1987 return of his application as unacceptable for filing was erroneous. Consequently, Courts' petition for reconsideration must, in all respects, be denied.

8. *Other matters*. Gutzel and Stateline indicate that they will co-locate their antennas on the existing tower of WXOW-TV (auxiliary site). According to the Commission's engineering data base, the height above ground level for this tower is 250.2 meters. However, Gutzel's and Stateline's Section V-G, Form 301 and tower sketches indicate that the overall tower height above ground level is 184 meters. Because the applicants propose to locate their antennas on an existing tower of a Commission licensee and because specific reference is made to this tower in various places in the subject applications, the Commission can, drawing on the applications as a whole, confidently verify the height above ground level of the tower. Consequently, this discrepancy does not render the subject applications unacceptable.. However, Gutzel and Stateline will be required to amend their applications by submitting a corrected Section V-G and tower sketch as an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. WEBI indicates in Exhibit No. 1 of its application that Richard T. Wilson, Vice President and 29% stockholder of the applicant, is currently the General Sales Manager of Radio Stations WKTY(AM)/WSPL(FM) in La Crosse, Wisconsin. Exhibit No. 2 indicates that Eleanor St. John, President and 51% stockholder of WEBI, is the wife of Perry St. John who is currently employed as General Manager of Stations WKTY(AM)/WSPL(FM). Since the transmitter of the proposed La Crescent station and the existing La Crosse FM station are approximately 20.7 km (12.88 miles) apart, employment of Richard Wilson and Perry St. John in any managerial capacity at WKTY/WSPL may violate the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-82 (1970). Commission policy states that a common interest can reasonably be presumed to exist between husband and wife, and that the broadcast interests of one

must be attributed to the other. *Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981). Accordingly, an appropriate issue will be specified below.

10. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

| APPLICANT | DATE AMENDMENT FILED |
|---|---|
| Stateline | February 19, 1988 |

11. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to WEBI, whether the involvement of Richard T. Wilson, and Eleanor St. John's husband (Perry St. John) with Stations WKTY-AM/WSPL-FM, La Crosse, Wisconsin, is consistent with the Commission's cross-interest policy and, if not, whether a grant of the application would be in the public interest.

2. To determine which of the proposals would, on a comparative basis best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-7 hereinabove, the petition for reconsideration filed by Courts IS HEREBY DENIED.

15. IT IS FURTHER ORDERED, That Gutzel and Stateline shall submit the corrective amendments indicated in paragraph 8 to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the amendment IS ACCEPTED to the extent indicated herein: Stateline.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **May 13, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTE**

[1] Courts' reliance on ABCD Broadcasting Co., *supra*, is misplaced. That case involved resolving a discrepancy between data given by an applicant regarding height of antenna radiation center above ground level "(RCAGL)" against that height as portrayed in the tower sketch. The correct RCAGL, however, could be determined by employing the consistent value for height of antenna radiation center above mean sea level which was correctly stated throughout the application. In Courts' case, no analogous derivation could be drawn, as discussed above.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-465**

In the Matter of

Resolution of Interference
Between UHF Channels 14 and 69
and Adjacent-Channel
Land Mobile Operation

**ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO FILE REPLY COMMENTS**

**Adopted: March 31, 1988; Released: April 4, 1988**

By the Chief, Mass Media Bureau:

1. Now before the Commission is a *Motion for Extension of Time* filed March 28, 1988 by the Association of Maximum Service Telecasters (MST) requesting an extension of time, until April 25, 1988, for filing reply comments in connection with the Commission's recently released *Notice of Proposed Rule Making/Notice of Inquiry* in MM Docket No. 87-465, FCC 87-336 (released November 30, 1987) (*Notice*). That *Notice* solicited comments on proposals to amend Part 73 of the Commission's Rules to address the problem of interference between television stations operating on channels 14 or 69 and land mobile stations operating on frequencies adjacent to either channel. The *Notice* specified January 19, 1988 as the deadline for comments and February 3, 1988 as the deadline for reply comments.

2. On December 16, 1987, MST requested a sixty-day extension of time for filing of comments and replies, but specifically asked the Commission to set deadlines of February 17, 1988 for comments, and March 2, 1988 for reply comments, which provided for only a thirty-day extension of the original deadlines. By an *Order* dated January 4, 1988, the Mass Media Bureau granted MST's motion and set filing deadlines using the specified dates.[1]

3. On the same day the Bureau issued the extension *Order*, MST filed an errata to its motion for extension of time, pointing out the discrepancy. MST stated that it intended to request deadlines of March 21, 1988 for comments, and April 4, 1988 for reply comments. The Mass Media Bureau granted MST's amendment and substituted these dates as the deadlines for comments and reply comments.

4. In its *Motion for Extension of* Time, MST maintains that it needs additional time because (1) the large number of comments filed in this proceeding, particularly the comments of Land Mobile Communications Council (LMCC), among others, raise technical questions regarding the appropriateness of the suggested protection criteria; and (2) MST is prevented from obtaining timely advice and consultation from its members and engineers due to their preparations for upcoming annual meetings. MST maintains that the extension will not delay action on assignment of new stations on channels 14 and 69 as applications for additional UHF stations are frozen pending action in the advanced television inquiry. MST also states that the LMCC has no objection to the requested extension of time.

5. For all of the reasons cited by MST in its Motion for Extension of Time, we believe it would be beneficial to provide the additional time sought. However, in the absence of extraordinary circumstances, we do not contemplate any further extensions.

6. Accordingly, IT IS ORDERED that the date for filing reply comments in MM Docket No. 87-465 is extended until April 25, 1988. This action is taken pursuant to authority provided in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

7. For further information concerning this proceeding, contact Douglas J. Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

**FOOTNOTE**

[1] Order Granting Request for Extension of Time to File Comments in MM Docket No. 87-465.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-211**

In the Matter of

Amendment of Section 73.202(b), RM-4740
Table of Allotments,
FM Broadcast Stations.
(Santa Isabel, Puerto Rico and
Christiansted, Virgin Islands)

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 8, 1988; Released: April 22, 1988**

By the Commission:

1. The Commission has before it for consideration the Applications for Review filed (1) by Pablo Rodriguez (Rodriguez) and (2) by Amor Family Broadcasting Group (Amor)[1] of the *Memorandum Opinion and Order* [2] denying their respective Petitions for Reconsideration. Applicants seek review of the Mass Media Bureau's action dismissing Rodriguez's petition for rule making to allot Class B FM Chanel 258 to Santa Isabel, Puerto Rico. [3] Estereotempo, Inc. (Estereotempo) filed a consolidated opposition to the Applications. Rodriguez and Amor each filed a reply to Estereotempo's opposition.

## BACKGROUND

2. Rodriguez submitted a rule making petition seeking allotment of Channel 258B to Santa Isabel. In response to that petition, the Commission adopted the *Notice of Proposed Rule Making* (*Notice)* [4] proposing to allocate the requested channel and informing Rodriguez that, as petitioner, he was expected to file comments supporting the allocation and reiterating his intention to apply for the channel by the close of the comment period and that absent such continuing interest, the channel would not be allocated. The *Notice* also referenced the previously filed and pending application of Estereotempo, licensee of Station WIOB(FM),[5] San Juan, Puerto Rico, to change the transmitter site and improve the facilities of that station.[6] Estereotempo's application was incompatible with Rodriguez's proposal, inasmuch as a grant of one would preclude a grant of the other. As set forth in the *Notice*, action on Estereotempo's application was being held in abeyance pending the outcome of this rule making proceeding. Rodriguez failed to file timely comments in response to the *Notice*. His supporting comments, filed over a month late,[7] included neither a reason for their lateness nor a request to waive the Rules to permit their consideration.[8] Accordingly, the Bureau, on delegated authority, adopted a *Report and Order* [9] terminating the rule making proceeding without acting on the requested allotment to Santa Isabel.

3. Rodriguez also participated in the San Juan application proceeding, submitting petitions to dismiss and deny Estereotempo's application. Those petitions were denied by Bureau action pursuant to delegated authority.[10] Subsequently, while the *Notice* was pending, Rodriguez filed an untimely petition for reconsideration of that action.[11] Although procedurally defective, Rodriguez's reconsideration request was considered but denied. In response to that denial, Rodriguez filed an Application for Review, again in untimely fashion. Since Rodriguez's review request was late and failed to conform to Section 1.115(d) of the Rules, the staff determined that it did not merit consideration and dismissed it.[12]

4. Rodriguez and Amor subsequently filed Petitions for Reconsideration of the staff's action in the *Report and Order* dismissing the Santa Isabel allotment request. The Bureau denied these petitions in the *Memorandum Opinion and Order* because these and previous filings were untimely. In so doing it did not reach the relative merits of a new service at Santa Isabel or expanding the existing one at San Juan. Rodriguez's out of time filings had been manifested in both the underlying rule making proceeding, and as noted, in the San Juan application proceeding. Amor did not participate in the rule making proceeding, arguing that it had no actual knowledge of the *Notice* to be able to timely file an interest. The Bureau found that Amor could not claim that it was prevented from acquiring notice. The Bureau further pointed out that to accept Amor's interest, first advanced in the context of its reconsideration request, would be to undermine the Commission's ability to conduct its business in an orderly fashion so as to avoid reprocessing and resultant undue delays in providing service to the public, in this instance the introduction of increased service to San Juan.

## APPLICATIONS FOR REVIEW

5. Rodriguez argues that the requirement, as set forth in the *Notice*, that a petitioner restate its interest in a proposed FM allotment is an administrative practice and not a Commission rule. He notes that although this requirement is grounded on a concern that it is inefficient to make channel allotments which will remain unused, both he and Amor clearly would apply to operate a station on Channel 258B. Thus, Rodriguez characterizes the issue as a question of mere technical compliance with an administrative practice. Rodriguez argues that inasmuch as the Commission otherwise accepts tardy expressions of interest, administrative convenience does not require dismissal of its own rule making petition, citing *Gayles and Shreveport, Louisiana*, MM Docket No. 83-519, Mimeo No. 4060, released April 25, 1986, and *St. Johnsbury, Vermont*, MM Docket No. 80-667, Mimeo No. 30686, released January 13, 1982. According to Rodriguez, there exists merely an engineering conflict between the Santa Isabel and San Juan proposals which was evident prior to the comment deadline, and, therefore, the lateness of his expression of interest did not adversely affect the San Juan proposal. Rodriguez argues that any delay in the provision of expanded service to the San Juan area resulted not from his tardiness but from the fact the Estereotempo's application was held in abeyance pending the outcome of the instant proceeding. Rodriguez next argues that his conduct in regard to the application proceeding is irrelevant here, where the focus should be on providing service to the public. Finally, Rodriguez notes that a first service to

Santa Isabel is of a higher allotment priority than improved service to San Juan pursuant to Section 307(b) of the Communications Act of 1934, as amended. According to Rodriguez, Bureau action, as described below, has improperly elevated concern for technical compliance with administrative practice over the statutory mandate, Commission rules and policy, and precedent.

6. Amor similarly argues that this proceeding represents the last opportunity to provide Santa Isabel with local service and that Rodriguez's proposal must receive a substantial preference over a San Juan upgrade. Amor maintains that the lack of timely expressions of interest was unduly emphasized, pointing out that the Bureau had been aware of both its interest and that of Rodriguez for a year prior to adoption of the *Memorandum Opinion and Order* and that, accordingly, the purpose underlying the requirement for expressions of interest in advance of allotment action was clearly served. Finally, Amor contends that in light of other potential San Juan sites, neither Estereotempo nor its audience would be adversely affected by requiring modification of the San Juan application.

7. In its opposition, Estereotempo first argues that the cases cited by the applicants are inapposite, inasmuch as none concerned a contested allotment. Estereotempo asserts that the requirement to express a continuing interest is particularly compelling here in light of its own competing upgrade proposal. According to Estereotempo, the action below reflects a reasonable basis and gives notice that petitioners seeking allocations must adhere to Commission directives in contested proceedings. Estereotempo states that a grant of its application was frustrated by Rodriguez's attacks in the application proceeding, thereby denying it and the public of the benefits of a Station WIOB upgrade. In conclusion, Estereotempo asserts that in light of Rodriguez's "disregard" of Commission procedure, the reconsideration action below reflects administrative tolerance, is in the public interest, and correctly applies Commission discretion to require adherence to its processes.

8. Replying to the opposition comments, Rodriguez asserts that there is no precedent for distinguishing the *Shreveport* and *St. Johnsbury* cases from the instant situation. According to Rodriguez, Estereotempo has not made the requisite public interest showing to justify avoiding a preference for Santa Isabel service.

9. In its reply, Amor asserts without elaboration that it is significant that Estereotempo's is the only opposition to the Santa Isabel proposal. Next, Amor reiterates its position that, in light of Section 307(b), San Juan was never entitled to improved service at the expense of local service to Santa Isabel. Finally, Amor argues that the contested nature of this proceeding is not a bar to allotting Channel 258B.

## DISCUSSION

10. The Commission's procedural rules are designed to provide adequate time and opportunity for interested parties to fully participate in the decision making process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. They also permit the Commission to conduct its business within a reasonable period of time so as to avoid undue delay in the provision of service to the public. Accordingly, the Commission has required adherence to appropriate administrative standards.[13] Furthermore, it may dismiss requests which fail to meet these standards.[14] In Table of Allotment rule making proceedings, the Commission requires an expression of interest in a proposed channel in order to conduct the rule making process in an orderly manner. Notification of the requirement is set forth in each Notice of Proposed Rule Making issued in response to a channel allotment request. Absent an expression of interest, a newly allotted channel could lie vacant after the Commission had expended limited resources conducting a rule making proceeding and after parties had submitted comments regarding a proposed channel. An expression of interest is all the more important where the requested allotment action would conflict with another application. A further allotment under these circumstances would not only waste Commission and participants' resources, it could preclude additional or improved service elsewhere with no countervailing service benefit to the public. Thus, the requirement of an expression of interest is reasonable and necessary to the efficient conduct of the agency's business, and the Commission has good reason to preserve the integrity of its processes by requiring adherence.

11. The Commission is aware of no case, and the parties have failed to cite an allotment case, where an untimely expression of interest was considered in the face of a conflicting proposal. Further, the Commission's concern for the integrity of its processes is not limited to rule making proceedings involving its Tables of Allotments. In the context of the analogous broadcast application process, for instance, the Commission issued a Public Notice[15] setting forth a strict policy requiring adherence to filing deadlines. Pursuant to this policy, applicants seeking waiver of the deadline must demonstrate unusual or compelling circumstances which prevent timely filings.[16] The Commission deemed this policy necessary and reasonable to assure that all applicants are treated fairly and reasonably in dealing with Commission processes and to guarantee an identifiable point when the Commission can close the door to new applications, thereby assuring that it can efficiently and effectively fulfill its public interest mandate.[17] In the application context, to consider a late filed application is generally unfair to competitors and delays the provision of new service to the public. Similar concerns prevail in contested allotment proceedings.

12. As noted, Rodriguez failed to submit a timely expression of continuing interest in the proposed Santa Isabel channel as specifically required in the *Notice*. Also, Amor's interest was not timely filed, having been initially set forth in the context of its reconsideration request. Thus, the action by the staff terminating the Santa Isabel allotment proceeding was warranted. The Applicants for Review correctly point out that late filed interests have been accepted and considered. However, as noted by the Bureau in the *Memorandum Opinion and Order*, acceptance is limited to situations where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal. In these situations, it is actually in the public interest to consider late filed interests. To do otherwise would lead to the reprocessing of the same rule making petitions for which notice and the opportunity for comments has been given and which, in turn, would lead to delays in the provision of new broadcast service. This would not serve the public interest. An analogous policy is followed in FM application processing, where the rules expressly provide for ac-

ceptance of the first appropriate application filed subsequent to the close of the window for the filing of competing applications.

13. Consideration of the late filed interests here would also undermine the integrity of the Commission's processes. Amor does not claim it could not have acquired knowledge of the Santa Isabel proposal in time to comment thereon. Rodriguez's participation in both this proceeding and the conflicting San Juan application proceeding clearly indicate an adequate familiarity with Commission processes to have enabled him to file an appropriate expression of continuing interest. Significantly, the history of Rodriguez's late filings in both proceedings would indicate a consistent disregard for Commission specified deadlines. In light of this, neither Applicant for Review can rightfully claim good cause for consideration of its tardy expression of interest. Rather, to consider the late filed interests under the circumstances would further retard the action in response to Estereotempo's properly prosecuted application. Under the circumstances, acceptance of Rodriguez's or Amor's interest would be inequitable and would invite further disregard of Commission processes.

14. Finally, as noted, Rodriguez argued that a first service to Santa Isabel is a higher priority than improved service to San Juan. However, the Commission does not reach the issue of the comparative 307(b) benefits of the two proposals, since it has determined that consideration of the Santa Isabel proposal is not appropriate.

15. Accordingly, IT IS ORDERED, That the Applications for Review filed by Pablo Rodriguez and by Amor Family Broadcasting Group ARE DENIED.

16. For further information concerning this proceeding, contact Joel Rosenberg, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

**FOOTNOTES**

[1] Public Notice was given on July 28, 1987, Report No. 1670.

[2] 2 FCC Rcd 3454 (1987).

[3] *Report and Order*, 51 FR 6119, February 20, 1986.

[4] 50 FR 29450, July 19, 1985.

[5] Station WIOB was formerly known as Station WIOA(FM).

[6] File No. BPH-831116AK.

[7] The comment deadline was September 3, 1985. Rodriguez filed comments October 7, 1985.

[8] Although Estereotempo served Rodriguez with a copy of the opposition comments, Rodriguez's initial comments, filed after that opposition, were not served on Estereotempo. As set forth in the Bureau's *Report and Order* and *Memorandum Opinion and Order*, Rodriguez's failure to serve Estereotempo was a possible violation of the Commission's *ex parte* rules. Since that pleading was not acceptable due to lateness, the Bureau did not rule on the *ex parte* issue.

[9] 51 FR 6119, February 20, 1986.

[10] October 19, 1984 letter from the Chief, Audio Services Division.

[11] The filing deadline for reconsideration was November 20, 1984. Rodriquez did not file until December 19 of that year.

[12] July 30, 1987 letter from the Chief, Audio Services Division. Rodriquez filed this Application for Review approximately three weeks after the deadline for doing so.

[13] *See , Radio Athens, Inc.*, 401 F.2d 398 (D.C. Cir. 1968).

[14] *See , United States v. Storer* Broadcasting Co., 351 U.S. 192 (1956), and Ranger v. FCC, 294 F.2d 240 (D.C. Cir. 1961). The Ranger court ruled that an AM license application which lacked information required by the rules was materially deficient and that the Commission was not required to consider or reinstate it nunc pro tunc when it was subsequently completed and resubmitted after the cutoff deadline.

[15] FCC 85-534, October 4, 1984.

[16] *Id.*

[17] The Commission's concern with adherence to its filing requirements in order to insure administrative efficiency and effectiveness is not limited to the broadcast application context. For instance, in Julian, California, 50 FR 16704, April 29, 1985, the Commission reiterated its policy of not routinely granting extensions of time to file comments in rule making proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-180

In the Matter of

Southwestern Bell
Telephone Company

Transmittal Nos. 1537 and 1560
Revisions to Tariff F.C.C. No. 68

## ORDER DESIGNATING ISSUES FOR INVESTIGATION

**Adopted: March 31, 1988; Released: April 22, 1988**

By the Chief, Common Carrier Bureau:

### I. INTRODUCTION

1. MCI Telecommunications Corporation (MCI) and US Sprint Communications Company (US Sprint) have filed petitions for reconsideration, investigation, and clarification of our *May 15 Order* [1] which denied petitions against the transmittals captioned above. In the petitions now before us, MCI and US Sprint challenge the lawfulness of Southwestern Bell Telephone Company's (SWB) currently effective customer reporting requirements for originating "NXX" 800 access service.[2] In this order, we deny the petitions. Based upon information developed in the course of our consideration of the instant petitions, however, we are instituting an investigation of the lawfulness of SWB's reporting requirement.

### II. BACKGROUND

2. On March 20, 1987, SWB filed Transmittal No. 1537, to impose separate jurisdictional reporting obligations [3] on customers depending upon whether a given 800 call was interstate or intrastate in nature. For interstate traffic, the IC would have been required to report the numbering plan area (NPA) associated with the terminating telephone number or the terminating customer's serving wire center. For intrastate traffic, the customer would have been required to report the NPA/NXX associated with the terminating telephone number or the terminating customer's serving wire center. Transmittal No. 1537, Proposed Section 6.6.1. US Sprint filed a petition to reject the transmittal. MCI petitioned for partial rejection, or in the alternative, for suspension and investigation of specific tariff revisions. On May 14, 1987, SWB filed Transmittal No. 1560 which deleted the intrastate reporting requirements from SWB's interstate tariff.[4]

3. In an order released May 15, 1987 (*May 15 Order*), [5] we denied the MCI and US Sprint petitions. The Order also denied an MCI motion to accept supplemental comments filed on May 8, 1987 which, *inter alia*, cited an April 29, 1987 decision of the Texas Public Utilities Commission (PUC) requiring SWB to allow ICs the option of using a modified Percentage of Interstate Use (PIU) report for jurisdictional reporting for 800 access service. 2 FCC Rcd at 3125-26 n.4.

4. The SWB tariff currently requires each IC to file a weekly "Network Data Report" (NDR) listing "all 800 telephone numbers that can be dialed in one state and completed in a different state." SWB Tariff No.68, § 6.6.1. Because interstate 800 service calls can ultimately terminate anywhere in the nation, this provision effectively requires ICs to provide SWB with a report for all their interstate 800 service numbers. SWB requires that the NDR show, for each interstate 800 service telephone number, the NPA of the associated terminating seven-digit number. If an 800 service call terminates via special access "or other facility arrangement," the IC must provide the NPA associated with the terminating customer's serving wire center. *Id.* The report must contain "any time of day sensitive routing information which the Telephone Company requires to accurately bill." *Id.* SWB's tariff also requires an IC to provide an NDR before initial 800 access service is established. *Id.*[6]

### III. PETITIONS FOR RECONSIDERATION

5. MCI and US Sprint petitioned for reconsideration of the *May 15 Order*.[7] SWB filed oppositions, and MCI and US Sprint replied.[8] We dismiss both petitions.

6. As explained in *AT & T Communications*, 1 FCC Rcd 930, 931 (1986), Section 1.106 (a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1), precludes reconsideration of "interlocutory actions". Denial of a petition to reject a tariff generally falls within this category because such a denial merely constitutes a determination that a tariff is "not patently unlawful." Such a determination does not foreclose the Commission from determining subsequently that tariff provisions are unlawful, following an investigation or a complaint proceeding. Thus, such a limited determination is an interlocutory action. *See generally* 1 FCC Rcd at 931. Therefore, to the extent that the instant petitions seek reconsideration of our denial of petitions to reject SWB's transmittal, we deny the petitions.[9]

7. The factors that preclude our reconsideration of a decision to deny a petition to reject also preclude reconsideration of a decision to investigate a new tariff transmittal. Such a decision is also provisional in nature because it does not preclude the Commission from initiating an investigation of the tariff provisions in question at a later date and does not preclude aggrieved persons from filing a Section 208 complaint to challenge the rates or provisions in question. Therefore, we also dismiss MCI's petition to reconsider the denial of its petition to investigate.[10]

8. Although parties are not entitled to file petitions to reconsider the denial of a pre-effectiveness petition to investigate, and the Commission's Rules do not authorize the filing of post-effectiveness petitions to investigate; any party may suggest that the Commission investigate an effective tariff rate or provision[11] and the Commission, or this Bureau, may initiate such an investigation if the suggestion appears to be meritorious.[12] Our examination of the pleadings and other materials submitted in connection with the US Sprint and MCI petitions causes us to conclude that these tariff provisions do warrant investigation and we are accordingly initiating an investigation in this order.

9. The specific issues we will investigate in this proceeding are identified and discussed in the following paragraphs. We also describe the reconsideration petitions and responses in order to clarify the issues we designate for investigation. For convenience, we describe US Sprint and MCI as petitioners.

## IV. ISSUES PRESENTED

### A. Relative Accuracy

10. Both petitioners claim that SWB's NDR is an inaccurate reporting mechanism[13] and advocate the use of a percentage of interstate use (PIU) allocator or some variant thereof. PIU reports identify a carrier's percentage of usage ascribable to the interstate or intrastate jurisdiction based on actual usage experience.[14] Except in the modified PIU approach which US Sprint advocates, PIU is derived from past usage and applied to current usage to determine the jurisdictional breakdown for current billing purposes.

11. MCI states that the level of inaccuracy in the NDR method varies directly with the amount of IC traffic that will be dynamically routed. MCI Petition at 18. This is so because the NDR cannot account for the call-by-call selection of a termination point characteristic of many IC services, *e. g.*, 800 service credit card calls or customer-controlled dynamic routing options. According to MCI, the IUR method[15] by contrast can account for the unpredictable nature of much of MCI's traffic.[16] US Sprint advocates use of a modified PIU approach under which it would report its actual PIU 45 days after the close of a billing period and on a monthly basis. The 45-day lag is necessary to allow US Sprint time to develop the actual jurisdictional breakdown of traffic.

12. SWB disputes MCI and US Sprint's claims that NDR is less accurate than proposed alternatives. SWB states that, because the data submission required for PIU and IUR reporting necessarily lags behind actual usage, there will always be a "mismatch" between the traffic currently billed and the historical factor being applied to allocate traffic between jurisdictions.[17] Where significant changes in traffic patterns occur in the interim, misbilling would result, according to SWB. Moreover, SWB contends that US Sprint has failed to address SWB's concerns that PIU would be incapable of coinciding with SWB's bill period or of being end office specific, thereby exacerbating the inaccuracies of the PIU approach. Second SWB Opposition at 4.

13. SWB argues that MCI's "simulated" study comparing the error rate of IUR and NDR demonstrates at most that IUR could be superior for the "artificially created" situation studied. First SWB Opposition at 11. SWB claims that MCI does not provide the technical detail or raw data necessary to make the simulation probative. *Id.* at 11-12. SWB also states that had MCI complied with existing NDR requirements, actual experience could have been used to test MCI's assertions. *Id.* at 8 n.12. SWB states that had MCI's concerns about dynamically-routed traffic proved valid, SWB's "normal course of business would be to consider NDR enhancements to resolve them." *Id. See also* Second SWB Opposition at 5.

14. US Sprint and MCI challenge SWB's claims related to delays inherent in a PIU approach. US Sprint states that SWB's mismatch argument does not apply to the PIU method US Sprint proposes because its method does not rely on an historical surrogate. US Sprint Reply at 3 & n.2. US Sprint also disagrees with SWB's contention that US Sprint would be unable to provide end office specific information under a PIU approach (*id.* at 3-4) and questions whether such information is required to bill for 800 access service. *Id.* at 4.

15. MCI argues that SWB's criticisms of a PIU approach are equally applicable to the use of NDRs. Because of the complexities involved in producing a nationwide NDR report, MCI claims that it might even take as much time to produce an NDR as a PIU report. *Id.* at 2 n.4. MCI adds that even if NDR reports were timely submitted, SWB's own inability to provide data to its billing system in a timely fashion would be likely to result in application of the wrong NDR to usage. *Id.* at 3. Furthermore, with NDR, MCI claims that SWB will have to adjust all of its bills retroactively when the IC produces evidence of the actual distribution of traffic between interstate and intrastate jurisdictions. *Id.* at 2 n.5. *See also* MCI Petition at 24 n.58.

16. We have concluded that the NDR reporting method raises serious questions of accuracy that require investigation. The NDR method appears to assume that IC's can accurately determine in advance the ultimate termination point of every 800 service call. This assumption may be unrealistic given the increasing prevalence of the dynamically routed traffic cited by MCI and Sprint. Based on the information currently before us, we cannot ascertain whether SWB's NDR would permit accurate reporting and billing of dynamically routed calls. Petitioners thus raise a substantial factual question as to whether SWB's NDR requirement is sufficiently accurate to be a reasonable practice that complies with duties imposed upon SWB by Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). In this proceeding, therefore, we will investigate the relative accuracy of the jurisdictional reporting methods advocated by the carriers.

### B. Double Charging Issue

17. MCI claims that SWB's reliance on NDRs will result in double charging, which is *prima facie* unlawful. MCI Petition at 20. MCI notes, for example, that it is permitted to use the IUR reporting method in Texas for intrastate traffic. MCI maintains that its use of the IUR method "will result in a conflicting, but more accurate" jurisdictional report than the NDR method required under the interstate tariff. *Id.* at 23. MCI claims that the billing errors that would result from using the NDR method for interstate traffic, rather than the more accurate IUR method, "translate into an unjust and unreasonable, and unreasonably discriminatory practice by SWB, in violation of 201(b) and 202(a) of the Act." *Id.* at 22-23. *See also id.* at 25; MCI Reply at 1.

18. In response, SWB claims that prior Common Carrier Bureau decisions, as well as action in certain of the states in SWB's territory, demonstrate that NDR is not *per se* unlawful. First SWB Opposition at 9. SWB notes that Texas also approved NDR. *Id.* at 9, 11. Moreover, SWB correctly notes that a change to PIU would not insure consistency between state and federal jurisdictions, as various states in its territory have adopted or are considering the adoption of reporting methods other than PIU.

19. We are not persuaded that the petitioners' use of PIU for interstate reporting purposes will necessarily solve the reconciliation difficulties of identified by the petitioners. We also are not persuaded, however, that such dif-

ficulties would be exacerbated. Accordingly, we designate the question of the NDR method's potential for double charging as an issue for investigation herein.

**C. Burdensomeness**

20. Both petitioners claim that NDR is an unreasonably burdensome reporting method.[18] For example, MCI claims that, to order access from all NPAs other than that of the termination point for an 800 number, the IC must prepare separate NDRs for each of the other NPAs. If a customer chooses some customized routing options (*e. g.*, termination points that change depending upon the beginning and end of the business day in particular time zones), MCI claims that the NDR method would require it to prepare several thousand NDRs. MCI states that specialized reporting systems must be developed to accommodate the reporting requirement. *Id.* at 24. Moreover, MCI avers that the proprietary nature of NDR data continues to raise competitive questions, particularly when less intrusive methods are available. *Id.* at 24. *See also* MCI Reply at 9 n.22.

21. US Sprint argues that NDR's inherent burdensomeness and expense are exacerbated by SWB's requirement that the reports be provided on a weekly, as opposed to a more reasonable monthly, basis. US Sprint Petition at 4-5. Absent some relief from the weekly requirement, US Sprint states that it will seek compensation from SWB for expenses incurred in complying with the reporting requirements. US Sprint claims SWB has agreed to provide such remuneration. US Sprint Petition at 5 n.3. *See also* US Sprint Reply at 7 n.6.

22. SWB disputes MCI's assertion that the data required, the NPA, are proprietary. First SWB Opposition at 5 n.5. SWB claims that MCI's competitive concerns over these data are unrealistic given that NPA is intended to identify interstate traffic and SWB can only provide intraLATA 800 service. *Id.* SWB also disputes US Sprint's claims that SWB has agreed to remunerate ICs for the provision of NDR. SWB claims that such remuneration would only have been forthcoming had service been jointly provisioned. Second SWB Opposition at 5 n.8.

23. We have serious concerns about the practicability of implementing NDR and the burdensomeness of the multitude of reports which this methodology apparently requires. The SWB tariff effectively requires the ICs to provide a report on all of their 800 numbers to SWB on a weekly basis. Moreover, it appears that SWB, alone of all the larger local exchange carriers, requires NDR as opposed to PIU reporting for originating 800 access. In order to determine whether SWB's NDR requirement is unreasonably burdensome, we must obtain additional information regarding the administrative effort required to comply with the requirement.[19]

**D. 800 Service Credit Card Traffic**

24. The petitioners have argued that a high percentage of their 800 calls will be credit card calls in which an 800 number is used only to access the IC's local point of presence. Because it is impossible to predict the termination point of every credit card call, the petitioners argue that the NDR method would inevitably contain inaccurate information.

25. SWB contends that petitioners' concerns about 800 service credit card traffic are misplaced because the jurisdiction of such traffic is determined by the jurisdiction of the initial 800 service call and not by that of the underlying call. First SWB Opposition at 6. The services that an IC chooses to make available after its customers have reached the IC switch by placing 800 calls are irrelevant to jurisdictional reporting, according to SWB. *Id.* at 7; Second SWB Opposition at 6. Thus, under SWB's analysis, a credit card call should be treated for jurisdictional purposes as two calls: one from the credit card user to the IC's switch, and another from the switch to the called party.

26. Both petitioners contend that the jurisdictional nature of a call is determined by its ultimate origination and termination, and not, as SWB suggests, its intermediate routing. MCI Reply at 3; US Sprint Petition at 5-6. MCI cites *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492 (D.C.Cir. 1984) (*NARUC*) in support. MCI Reply at 5.

27. MCI also claims that SWB's jurisdictional characterization of MCI's credit card traffic would violate of 47 U.S.C. § 202 by creating unreasonable discrimination. *Id.* at 1, 7. MCI claims that AT&T and SWB credit card calls are originated in a manner that is functionally identical to MCI's credit card origination and are treated for jurisdictional purposes as single end-to-end calls. *See also* US Sprint Reply at 6-7. According to MCI, if SWB applied its two-call theory to AT&T, all "0+" credit card calls that originated in one state and were processed by a credit card switch in the same state would be intrastate and those processed by a credit card switch in a different state would be interstate. MCI Reply at 4-5. MCI states that applying SWB's approach to MCI at the present time, given that MCI only has one credit card switch in SWB's territory, in Texas, would mean that, for example, a credit card call originating and terminating in Oklahoma, would be billed as an interstate call. *Id.* at 5 n.11.

28. We disagree with SWB's argument that 800 credit card traffic terminates at the IC's credit card switch for jurisdictional purposes, and thus should not be viewed as "dynamically routed." In the *NARUC* case, *supra*, the Court of Appeals for the District of Columbia Circuit concluded that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation. That conclusion applies equally in the instant case. Switching at the credit card switch is an intermediate step in a single end-to-end communication. *See also United States v. AT & T*, 57 F. Supp. 451 (S.D. N.Y.), *aff' d sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945) (per curiam) (hotel PBX not local exchange service, but rather part of an end-to-end communication). Accordingly, our analysis of the accuracy and burdensomeness of SWB's NDR requirement will recognize the application of the requirement to calls of this nature.

**V. INFORMATION REQUIRED**

29. In order to investigate the issues identified in the preceding paragraphs, we require some additional information from SWB regarding its NDR reporting method. Accordingly, we direct SWB to respond to the requests for information and justifications set forth below in its direct case.

30. In their response to this Order, therefore, SWB is directed to:

(A) Explain how the accuracy of NDR is equal or superior to the PIU approach advocated by MCI and by US Sprint. Include in the explanation a description of NDR's ability to account for "dynamic routing" options and 800 credit card calls. State whether any interstate 800 access service customers are supplying NDRs in compliance or partial compliance with SWB's tariff. If such NDRs are being supplied, state whether such customers have dynamically routed interstate 800 access service traffic. If so, state (1) what the relative proportion of such dynamically routed interstate traffic is as compared to all interstate 800 access service traffic of such customer; (2) to what degree such dynamically routed traffic involves changes in terminating locations from one state to another so as to affect the jurisdictional character of the traffic; and (3) how dynamically routed traffic is now billed, to what extent misbillings occur, and if they do occur, how they are corrected. If MCI responds to SWB's direct case, MCI should include an explanation of the methodology it employed for deriving the IUR and PIU estimates of jurisdictional use and explain the reason for the variances chosen in the "Monte Carlo simulation" attached to its petition.

(B) Explain how the burden to interstate 800 access service customers of compliance with NDR requirements is equal to or less than the burden of compliance with the PIU approach advocated by MCI and US Sprint. Include an identification of the information ICs must provide to reflect in their report any interstate routing changes. Illustrate this clarification with a description of the number and format of NDRs that would be required: (1) if an end user ordered interstate 800 service in fewer than all NPAs; and (2) if an end user ordered interstate 800 service routing to one location during regular business hours and to another location, in a different state, after business hours, on holidays and on weekends.

(C) Describe how NDR would account for an urgent end user request for change in service from one terminating location in all NPAs at all times in the cases described in paragraph (B)(1) and paragraph (B)(2), *supra*.

(D) State whether any existing 800 access service customers that are supplying NDRs in compliance or partial compliance with the SWB tariff are also parties to joint or reciprocal arrangements with SWB for provision of 800 service or any other agreements relating to provision of 800 service, including 800 service number translation and database query. If so, describe with particularity the nature of such arrangements and any compensation or other consideration to such customers for supplying NDRs resulting from such arrangements.

(E) Supply examples of the NDRs which such existing, complying or partially complying customers are furnishing to SWB.

(F) Quantify the additional cost, if any, to SWB of permitting ICs to choose an alternative reporting method such as PIU in place of NDR. Parties responding to SWB's direct case are requested to quantify the additional cost to them of using NDR as opposed to a PIU method of reporting.

(G) Explain and justify why NDRs need be supplied more frequently than monthly.

(H) State whether under the PIU approaches advocated by MCI and US Sprint, data need be aggregated other than on a statewide basis and, if so, explain and justify this necessity.

(I) Explain why SWB could not or should not delay billing, as US Sprint proposes, to permit 800 access service customers to provide actual percentages of jurisdictional use.

## VI. PROCEDURES

31. This investigation will be conducted as a notice and comment proceeding. SWB, US Sprint and MCI are designated as parties. SWB shall file a direct case no later than 30 days after the release of this order. The direct case shall present SWB's position with respect to the issues described in this Order and shall respond to the specific requests in Part V of this Order. Pleadings opposing the direct case may be filed no later than 30 days after SWB files its direct case and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." SWB may file a "Rebuttal" to oppositions and comments no later than 15 days after the last opposition or comment has been filed.

32. For purposes of this non-restricted tariff proceeding, the parties are advised that *ex parte* presentations are permitted. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of that presentation to the Secretary of the Commission for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written submissions, must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. *See* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

## VII. ORDERING CLAUSES

33. In light of the foregoing, IT IS ORDERED that the emergency petition for reconsideration and petition for expedited investigation of MCI Telecommunications Corporation and the petition for partial reconsideration and clarification of US Sprint Communications Company ARE DISMISSED.

34. IT IS FURTHER ORDERED that the motion to accept late-filed pleading filed by US Sprint Communications Company IS GRANTED, and that on our own motion, this Bureau ACCEPTS the supplemental reply filed by MCI Telecommunications Corporation and the additional submissions of Southwestern Bell Telephone Company filed on November 16, 1987.

35. IT IS FURTHER ORDERED that an investigation pursuant to Sections 201-205, 403 of the Communications Act of 1934, 47 U.S.C. §§ 201-205, 403 IS HEREBY INSTITUTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald A. Brock
Chief, Common Carrier Bureau

## FOOTNOTES

[1] Southwestern Bell Telephone Company, Transmittal Nos. 1537 and 1560, 2 FCC Rcd 3125 (1987)(*May 15 Order*).

[2] Local exchange companies (LECs) offer interexchange carriers (ICs) originating "NXX" 800 access. Under the "NXX" plan, LECs assign each IC a unique three-digit prefix (NXX) which becomes part of the number dialled for an 800 service call(1-800-NXX-XXXX).

[3] An 800 service number does not contain an area code associated with a particular geographic area. Thus, the LEC providing originating access to the IC transmitting the call cannot determine whether the call will terminate at an interstate or intrastate point, and thus whether it should be billed under the LEC's interstate or intrastate access tariff. The LEC therefore must obtain a report from the IC identifying its traffic volume by jurisdiction.

[4] Transmittal No. 1560 became effective on not less than one day's notice pursuant to Special Permission No. 87-312, issued by the Tariff Division on May 14, 1987.

[5] *See* note 1, *supra*.

[6] The NDR method of jurisdictional reporting differs from the percentage of interstate usage (PIU) method, described *infra* at note 14.

[7] Emergency Petition for Reconsideration, and Petition for Expedited Investigation of MCI, filed June 2, 1987 (MCI Petition); Petition for Partial Reconsideration and Clarification of US Sprint, filed June 15, 1987 (as corrected June 16, 1987) (US Sprint Petition).

[8] Opposition of Southwestern Bell Telephone Company to Petition for Reconsideration and for Expedited Investigation, filed June 15, 1987 (First SWB Opposition); Opposition to Petition for Partial Reconsideration and Clarification of Southwestern Bell, filed June 29, 1987 (Second SWB Opposition). Reply of MCI Telecommunications Corporation, filed June 25, 1987 (MCI Reply); US Sprint Reply to Opposition, filed July 10, 1987 (US Sprint Reply). US Sprint submitted a reply one day late and filed a motion to accept late-filed pleading (Motion). That motion states that US Sprint had completed drafting its reply by the July 9 deadline, but could not effectuate filing because its "recently acquired" word processing and printing equipment malfunctioned. Motion at 1. It states that the malfunction was corrected shortly after 5:30 pm so that the other parties could be served by the deadline and so that SWB has not been prejudiced by any delay. *Id.* SWB has not opposed the motion. In view of the minimal nature of the delay, the lack of prejudice to SWB, and the extenuating circumstance given, the motion is granted. MCI submitted another pleading, Supplemental Reply of MCI, filed July 29, 1987 (MCI Supplemental Reply). MCI did not file any motion to accept this extraordinary pleading. In view of the complexity of the issues raised in this proceeding and the lack of objection to the pleading by SWB, we accept it on our own motion. On November 16, 1987, at the request of the Tariff Division, SWB submitted its intrastate tariff reporting provisions for 800 access service. *See* Letter to William J. Tricarico, Secretary, FCC, from Dennis B. Eidson, SWB (dated Nov. 16, 1987) and attached material. This supplemental material is also accepted.

[9] Section 204 of the Communications Act, 47 U.S.C. § 204, authorizes the Commission to suspend a tariff only during the time period before the tariff becomes effective. Once a tariff becomes effective, we lack statutory authority to respond to petitions to reconsider a decision to refrain from suspending the tariff. *See generally* 1 FCC Rcd at 931.

[10] MCI challenges our refusal in the *May 15 Order* to consider MCI's supplemental comments. MCI Petition at 26-27. MCI avers that the supplemental comments contained relevant and important material, including, *inter alia*, information concerning the Texas PUC 800 access decision. *Id.* SWB argues that this Bureau should not consider the arguments raised in MCI's supplemental comments because the pleading was rejected on procedural grounds in the *May 15 Order*. First SWB Opposition at 4. In view of our determination that the *May 15 Order* is not subject to reconsideration, there is no reason to reconsider the rejection of the supplemental comments.

[11] *See* Section 1.41 of the Commission's Rules, 47 C.F.R.§ 1.41.

[12] If the Commission determines that the suggestion is not meritorious, no formal Commission response is required nor should parties anticipate one.

[13] MCI Petition at 2; US Sprint Petition at 4.

[14] Both LECs and ICs now furnish PIU data for various services. For example, ICs furnish PIUs to the LECs for Feature Group A (FGA) and Feature Group B (FGB) usage. In the case of FGA and FGB, however, the PIU is based in part on exit and entry surrogates. In the case of PIUs provided by the LEC for Feature Group C (FGC) and Feature Group D (FGD), *see, e. g.*, SWB Tariff F.C.C. No. 68, § 2.3.14(A)(4) (SWB will determine PIU from call detail for FGC and FGD), and by the ICs for 800 service, however, MCI claims that the PIU is derived from actual past usage, without the use of surrogates. *See generally* Letter to Chief, FCC Common Carrier Bureau, from Roy L. Morris, MCI (dated May 8, 1987)(Supplemental Comments), at 4 n. 8. MCI claims that SWB has mischaracterized MCI's reporting proposal as based on "entry and exit" surrogates. MCI Petition at 19. *See also* US Sprint Petition at 4; US Sprint Reply at 2. SWB disputes this claim. First SWB Opposition at 10. The Texas Public Utility Commission recently approved a variation of PIU reporting, known as an IntraLATA Usage Report (IUR), as an alternative to NDRs. Whereas a PIU report is generally a statewide, quarterly report, an IUR is end office and tandem specific and is provided monthly. The Texas PUC Hearing Examiner stated that "end office specific IURs are likely to provide more accurate billing data than can NDRs due to the unavoidable problem of NDR data distortion attributable to the dynamic routing, call allocation and call overflow features to be offered by the IXCs." Examiner's Report, Public Utility Commission of Texas, Docket No. 7160, released Apr. 8, 1987 (Examiner's Report) *adopted by the Texas PUC*, Apr. 29, 1987, at 29. *See also id.* at 43. The Texas Examiner also found that the IUR would insure non-disclosure of competitively sensitive data. *Id.* at 29, 44. The Texas PUC permitted the use of either NDR or IUR, at the IC's option, because of the difficulty which AT&T would have in adapting its switches to implement the IUR on the end office and tandem basis which the Examiner required. Examiner's Report, at 28. The Texas Examiner's Report, submitted by MCI in its supplemental comments, was not considered in the *May 15 Order*. *See supra* para. 3.

[15] *See* note 11, *supra*.

[16] MCI cites a study attached to its supplemental comments showing a significant average error for NDR and near zero average error for IUR. MCI Petition at 20. In addition, the variance of the error was always smaller for IUR than NDR. *Id.* This study was based on "Monte Carlo simulations of 50 weeks of simulated trial studies." MCI Reply at 8. Monte Carlo simulations are used for forecasting results when the phenomena under study are random and unpredictable. MCI contends that SWB has itself admitted that IUR is sufficiently accurate for determining the jurisdictional makeup of calls. MCI Petition at 21-22, *citing* Southwestern Bell Telephone Company's Reply to Exceptions in Texas PUC Docket No. 7160, filed Apr. 23, 1987, at 3.

[17] First SWB Opposition at 11; Second SWB Opposition at 3.

[18] MCI Petition at 2; US Sprint Petition at 4.

[19] We note US Sprint's claim that requiring it to furnish an initial NDR will have a discriminatory effect. *See* US Sprint Petition at 7-8, affidavit attached to US Sprint Reply. We are not designating that question for investigation at this time. A decision on the overall lawfulness of the NDR requirement may render the discrimination issue moot.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN. Docket No. 84-467**

In the Matter of

Preparation for an International
Telecommunication Union Region 2
Administrative Radio Conference
for the Planning of Broadcasting
in the 1605-1705 kHz Band

## THIRD REPORT

**Adopted: February 26, 1988; Released: April 22, 1988**

By the Commission:

## INTRODUCTION

1. This proceeding was begun in 1984 to develop a record to assist the Commission in its preparations for the First Session of the above-captioned international Conference on the use of the expanded AM band from 1605 kHz to 1705 kHz.[1] For this purpose, two *Notices of Inquiry* were issued inviting comments by interested parties.[2] Two *Reports* concluded this phase of the proceeding with the adoption of FCC recommendations regarding the technical criteria to be applied to broadcasting in the expanded band as well as the method for planning the band.[3] To prepare for the Second Session of the Conference,[4] which is to develop the final text for a Regional Agreement as well as the associated Broadcasting Plan,[5] a *Third Notice of Inquiry* was recently adopted.[6] It is to the record developed in response to this latter *Notice* and through other Conference preparatory activities that we now turn. However, before doing so, it is necessary to provide some background information to put the current subject in focus.

## THE FIRST SESSION : PREPARATIONS AND RESULTS

2. The Commission's *First Notice* in this proceeding sought public comment on a wide variety of issues relating to the most effective use of the new broadcasting spectrum.[7] Many of these were technical issues concerning such matters as power limits, protection requirements and signal propagation. Also to be considered, was the type, extent and location of the United States' needs. Early identification of these needs would enable our representatives at the Conference to take appropriate steps to obtain international protection for them. Not only were new broadcast uses of the band to be considered, but also the disposition of current domestic users of this band, such as Travelers Information Stations (TIS) operating on 1610 kHz, was a matter for consideration.

3. After reviewing the record developed in response to the *First Notice* and taking into account information gained through Commission participation in such preparatory activities as meetings of working parties of Study Groups of the the International Radio Consultative Committee (CCIR), and meetings of the Inter-American Telecommunications Conference (CITEL), the Commission further refined its views.[8] These preliminary views, including treating the new band as an extension of the existing AM band rather than as a separate band, were detailed in the *Second Notice*. The Commission also proposed that the protection ratios, class of emission and bandwidth of emission should be the same as for the existing AM band. Additionally, comment was sought on the issues that had not yet been resolved, most significantly the planning method for use of the expanded band.

4. Two Commission *Reports* concluded the FCC's preparations for the First Session. The *First Report* dealt with most of the technical issues to be considered at the First Session, except for the planning method to be used. At this juncture, the FCC specifically recommended that the technical criteria contained in the Regional Agreement for the Medium Broadcasting Service in Region 2 for the existing AM band (535-1605 kHz) generally should be applied to the expanded band at 1605-1705 kHz to the maximum extent possible in recognition of the fact that the new frequency band is best considered as an extension of the existing band. Such an approach requires the fewest design and production changes and therefore promotes the earlier availability of receivers capable of receiving the extended band. This in turn fosters the early commencement of service on those frequencies in Region 2. Moreover, the FCC's Recommendations noted that this makes it possible to use many of the existing planning tools and computer techniques that already have been successfully applied to AM planning activities in the Region.

5. In the *Second Report*, the Commission recommended that the United States propose to the Conference that allotment planning, rather than assignment planning, be used for the new medium frequency broadcast (AM) band 1605 KHz to 1705 kHz.[9] Under an assignment plan, an assignment for each station is entered into the plan with a specific location, power and other pertinent characteristics; whereas, an allotment plan makes designated frequencies available for use anywhere within a specified area. Allotment planning offers more flexibility while helping to ensure an efficient and equitable distribution of channels. In addition, an allotment plan avoids the need to identify specific requirements and to resolve the many ensuing incompatibilities. Moreover, because it deals with allotments rather than specific assignments, an allotment plan provides a mechanism to protect future rights without the need to identify them in advance.

6. The U.S. proposals provided a foundation for much of the work of the First Session, and U.S. views were followed in all major regards. This included technical standards and adoption of an allotment planning method. Rather than require the specification of facilities, the allotment plan is framed in terms of the effect on other allotments. Not only does this simplicity permit changes in location or station facilities, it permits multiple uses within allotments provided that requisite international protection is provided. The U.S. urged that the method adopted should provide ample opportunity to re-use individual channels. Moreover, the method should recognize that administrations will construct and operate stations under

different schedules. Therefore, the method should preserve the rights of the administrations to develop broadcast operations in the future at times of their choosing.

7. The First Session adopted technical standards for the band 1605-1705 kHz consistent with those applied to the existing AM band. It also adopted additional technical criteria needed to facilitate development of an allotment planning procedure, *e. g.*, spacing requirements between allotment areas. The First Session, however, was unable to resolve two of the technical issues before it: the relationship between electrical and physical antenna heights and the technical basis for sharing the band between broadcast and non-broadcast services in Region 2. Both of these issues were referred to the CCIR for further study.

## PREPARATIONS FOR THE SECOND SESSION

8. *Introduction.* In order to prepare for the Second Session, the Commission adopted the *Third Notice of Inquiry* inviting comments on the various international issues to come before it.[10] In addition, the Commission has been involved in several types of conference preparatory activities which were taking place during this intersessional period. For instance, the Industry Radio Advisory Committee and its technical and allocations Subgroups have resumed their consideration of expanded band issues. Also, both the CCIR and the International Frequency Registration Board (IFRB) are performing intersessional studies in preparation for the Second Session of the Conference.[11]

9. *Development of a Plan.* The *Report* of the First Session detailed five principal steps (in the allotment method) to be followed in establishing the plan at the Second Session of the Conference. These basic steps are as follows:

1) Using the appropriate co-channel standardized distance, areas in each country are identified to which a minimum number of channels is allotted;

2) The minimum number of channels to be allotted to each of the above areas is determined;

3) Taking into account the need to minimize adjacent channel interference, the minimum number of allotments are made;

4) The remaining channels are allotted pursuant to decisions of the Second Session;

5) Bilateral or multilateral negotiations take place between neighboring countries as desired.

10. While most issues related to the allotment planning method have been resolved, further refinement of the method by the IFRB is necessary. One of the Board's tasks is to develop a map for Region 2 which depicts the allotment areas in accordance with the first two planning steps described above. In those areas where channels initially will remain unallotted, Conference procedures dealing with such channels will need to be developed. Additionally, the IFRB is performing studies related to the standardized distances that are to be employed for mixed land/sea paths. A final issue that particularly warrants further study is development of procedures to be applied for coordinating adjacent channel assignments in border areas.

11. Although allotment planning allows considerable latitude in its implementation, the United States will need to coordinate extensively along its borders with Canada and Mexico to resolve adjacent channel incompatibilities arising from the allotment of five interleaved channels to each country. The *Third Notice* invited comments directed to the development of coordination guidelines. Likewise, parties were given the opportunity to address the issue of whether the Commission should adopt the allotment plan or a variant of it domestically or instead should use an assignment-based system. Regardless of the system chosen, we asked parties to consider whether the Commission should apply the same levels of protection domestically as are specified internationally.

12. *Other issues.* Other specific areas of inquiry of the *Third Notice* regard technical standards, the text of the draft agreement and provisions for the Travelers Information Stations (TIS). The technical issues remaining concern electrical vs physical height of antennas and sharing criteria between broadcast and non-broadcast services. Parties were invited to provide measurement data to help illuminate the relationship between electrical and physical height. Because actions taken at the Conference could affect the domestic technical assignment criteria that should be applied to the new band, comment was sought on any international action that would have domestic implications. In this connection, consideration was to be given to protection ratios, RF bandwidth limitations, calculation methodologies and contours to be protected, as well as related matters such as groundwave and skywave propagation criteria.[12]

13. Comment also was invited on the the draft agreement developed by the First Session of the Expanded Band Conference, recognizing that it needs to be refined before it is adopted at the Second Session. Only one area of the draft agreement, however, is likely to undergo major revision. The scope of the draft was limited by the agenda of The First Session to embrace only the use of this band by the broadcast service. Subsequently, the Second Session has been empowered to develop regulatory procedures governing the use of the band by other services in Region 2.[13] Accordingly, the draft agreement must be revised to deal with this by defining the relationship between the allotments in the broadcast service and the permitted services, fixed and mobile.[14]

14. In addition, the impact on TIS operations needed to be considered. Earlier, it had become clear that it was not feasible to maintain TIS operations on 1610 kHz. Without international interference protection from new broadcast stations in the expanded band, TIS operations would not be able to provide effective service on 1610 kHz. Based on the work done to date, the most feasible approach appears to involve the use of 1700 kHz for TIS, (presumably on an exclusive basis). Existing 1610 kHz users would move there and new operations would be established on that frequency. Clearly, international coordination with Canada and Mexico are important to the effective implementation of such an approach. Comments were sought only on the international aspects of TIS' spectrum allocation.

## CONCLUSIONS REGARDING SECOND SESSION ISSUES

15. *Recommendations regarding a draft agreement.* As noted, one of the main tasks before the Second Session is the development of the text for the final agreement. The

*Third Notice* offered one possible model for this purpose. It involved the inclusion of appropriate provisions taken from Appendix 30 of the international Radio Regulations. Appendix 30 contains special procedures which are applied to proposed terrestrial uses in a band planned by the Broadcast Satellite Service (BSS). In effect, each such proposal is examined by the IFRB to determine if there is a probability of harmful interference to assignments in the BSS Plan. Here, a similar examination would be made by the IFRB of the impact of non-broadcast uses on the broadcast Plan.

16. Objection to the Appendix 30 approach has been made in comments filed by Offshore Navigation, Inc., (ONI) a company engaged in radiolocation operations. In its view, that approach is unacceptable because it forecloses radiolocation operations even if they can be conducted without causing or receiving interference. Instead, it seeks to rely on No. 342 of the Radio Regulations to permit it to conduct operations that do not result in interference. ONI has provided a description of the transmissions it uses and asserts that they could be conducted without impact on broadcast stations. While this may be true, it is important to bear in mind that at a date to be determined by the Second Session the radiolocation service is to become a secondary service in this band. As such, it is to provide full interference protection to both the primary and permitted services in the band while at the same time not receiving interference protection for itself. Thus, the assertion of non-interference is a necessity if radiolocation operations are to continue. It appears that the essence of the issue is not whether the language derives from Appendix 30 or some other source. Rather, it is a function of the status of radiolocation as a secondary service. That being the case, the agreement needs to be revised to include appropriate text to reflect the need of the non-broadcast operations to provide full protection to the broadcasting Plan. Consistent with its status and pursuant to the agreement, individual countries will determine if they wish to authorize such operations in this band, whether under No. 342 or otherwise. The choice of language for the agreement does not alter this situation.

17. Although it has not been the subject of extended comment in this proceeding, the issue of the text for the final agreement has been given careful consideration by the Commission. In addition, it was discussed internationally at the recent Lima meeting of CITEL PTC II, where a revised draft text was introduced for discussion by a member of the IFRB. The revisions in the earlier text were designed to deal with non-broadcast as well as broadcast uses of the band. Although no decision as such was made regarding this text, it met with general support by the countries attending the CITEL meeting. The Commision believes that this text with minor revisions is appropriate for adoption at the Second Session. Accordingly, the revised text will be forwarded as an FCC recommendation for a United States proposal to the Second Session. The recommended agreement text is attached as an appendix. As explained below, this is the only area for which a specific recommendation is warranted.

18. *Technical issues*. As noted previously, there were two technical issues not resolved by the First Session: the relationship between physical and electrical antenna heights and the sharing of the band between broadcast and non-broadcast uses. As to the former, considerable study has been given to this topic by the Radio Advisory Committee and by the CCIR to determine whether it would be possible to develop a more accurate assessment of an AM tower's electrical height than that currently in use in Region 2. The Technical Subgroup of the Radio Advisory Committee conducted a study of the information provided by U.S. stations operating on frequencies above 1500 kHz. This study revealed no correlation between physical and electrical antenna heights that would permit a more accurate assessment of a tower's electrical height than that currently utilized by Region 2. Likewise, the work of the CCIR proved to be inconclusive, and it, too, was unable to offer specific recommendations. Based on these studies, we believe that the asserted correlation between physical heights and electrical heights does not exist. Thus, when this issue was discussed at the recent CITEL PTC II meeting (held in Lima, Peru, August 3-7, 1987), there was agreement that this subject was not a practical one for resolution by the Conference and that electrical height in the band 1605-1705 kHz should be based upon "free space" calculations as is the case in the band 535-1605 kHz. In other words, the electrical height is to be determined using the velocity of transmission in a vacumn rather than adjusting for velocity of transmission in the tower itself.

19. Another technical matter left for resolution at the Second Session of the Conference is the subject of "sharing criteria." At the present time, in Region 2, the band 1605-1705 kHz is allocated to the fixed, mobile and aeronautical radionavigation services on a primary basis and to the radiolocation service on a secondary basis. However, on a date to be decided by the Expanded Band Conference, the band 1605-1625 kHz is allocated to the broadcasting service on an exclusive basis and the band 1625-1705 kHz is allocated to the broadcasting service on a primary basis, to the fixed and mobile services on a permitted basis and to the radiolocation service on a secondary basis.[15] Although most countries in the Region intend to use the band for broadcasting, some intend to continue (or even add) non-broadcast uses. As a consequence, it is necessary to develop sharing criteria so that these non-broadcast uses do not cause a derogation in the broadcasting Plan to be adopted. CCIR has investigated this matter and it will submit a report to the Second Session of the Conference. The Conference will need to make a decision on a related matter which pertains to the "service quality" to which non-broadcast uses should be protected.[16] It is the FCC's tentative conclusion that such uses should be protected to a quality of service equivalent to "marginal commercial quality". This would ensure the continued utility of such non-broadcast uses without imposing excessive contraints upon the broadcast service.

20. *Treatment of TIS operations*. A significant number of TIS stations now operate on 1610 kHz.[17] Some of these stations are licensed by the Commission. Others, operated by federal agencies, such as the Department of Interior, are the responsibility of the National Telecommunication and Information Administration. Under current regulation, all TIS stations operate outside the 535 - 1605 kHz band. At present, TIS operations are required to protect AM stations on adjacent channels but TIS facilities are not themselves afforded protection from such stations. Thus, while TIS operators must locate where adequate service can be provided, they must do so without causing interference. While this has presented little difficulty in the past, it could become a significant problem once broadcast use of the expanded band takes place.

21. This matter received considerable attention by the Allocation Subgroup of the Radio Advisory Committee as well as in various interagency meetings. As mentioned in the *Third Notice*, it became clear that it was not feasible to maintain TIS on 1610 kHz. Moreover, without international interference protection from new broadcast stations in the expanded band, TIS operations would not be able to provide effective service on 1610 kHz. As we observed in the *Third Notice*, the most feasible approach appears to involve the use of 1700 kHz for TIS, (presumably on an exclusive basis). Commenters support the move by existing 1610 kHz users to 1700 kHz which also would be available for new TIS operations. It is recommended that for purposes of international interference protection TIS be considered as a broadcast service. However, it is not feasible to expect that international interference protection would be specifically geared to TIS operations. Instead, interference protection for TIS or other broadcast operations would be derived from the allotment Plan adopted by the Conference. Nonetheless, effective coordination with Canada and Mexico is essential and can play an important part in maximizing the opportunity for these stations to offer effective service.

22. *Inter-regional sharing.* In addition to sharing criteria designed to deal with sharing the band between broadcast and non-broadcast uses within the Region, there is a concern regarding possible interference because of the sharing of the band with other uses in other ITU Regions. In particular, Maritime Mobile Service operations in Region 1 in the bands 1605.5-1625 kHz and 1635-1800 kHz could cause interference to broadcasting in Region 2. Although the Second Session will be a regional conference and, therefore is not competent to adopt standards applicable outside that Region, we believe a recommendation from the Second Session as to the technical standards for inter-regional interference to be adopted by IFRB would be appropriate. The Lima CITEL PTC II meeting adopted a resolution that, when the IFRB considers the compatibility between assignments made according to the Region 2 Broadcasting Plan and those of the Maritime Mobile Service in Region 1, the analysis should be carried out on the basis of groundwave propagation for the latter service. In other words, no protection to skywave service would be provided. The U.S. supported this position at the Lima CITEL PTC II meeting.

23. *Development Of A Regional Plan* The major portions of the technical criteria for use of the expanded band as a broadcast service have already been adopted at the First Session of the Conference. Therefore, the bulk of the work at the Second Session will be devoted to the development of a regional plan for broadcast use of the expanded band. As the First Session chose an allotment rather than an assignment plan to distribute channels, current planning will be framed in terms of the effect of one allotment on other allotments.[18] For planning purposes, standardized separations between co- channel allotment areas have been adopted. The need for an additional refinement to the allotment procedures was identified at the Lima CITEL PTC II meeting. It involves the use of the "pairing" concept, which allows for more efficient allotments than otherwise would be possible. As noted at the Lima CITEL PTC II meeting, additional work is needed so that the Second Session of the Conference will have complete studies using 450 km, 500 km and 600 km as standardized distances for mixed land and sea paths.[19] With such data, the Second Session will be able to properly balance the trade-offs of more available frequencies for some allotment areas against increases in interference resulting from shorter distances between allotment areas. Once these studies are completed, it will be possible to formulate recommendations concerning the most desirable mixed path distance(s) to be used for development of the allotment areas.

24. The planning techniques adopted at the First Session are based on co-channel considerations primarily. This is so because the allotment planning methodology is based on the re-use of the same frequency at a given standardized distance. Because these co-channel limitations are the most restrictive, they provided the general outline of the allotment areas. Within allotment areas, additional, albeit lesser, restrictions are imposed by the need to consider adjacent channel allotments and assignments. The Second Session will need to take these adjacent channel problems (especially first adjacent) into account as frequencies are alloted. Since a fully automated approach to evaluating adjacent channel situations (analogous to the co- channel situation) has not been found, it will not be possible to eliminate all first adjacent channel conflicts between all geographically adjacent countries.[20] However, we anticipate that the development of the Plan at the Second Session can avoid the potential for many first adjacent channel imcompatibilities between countries by judicious assignment of frequencies. Nevertheless, in many cases, such as when only two countries share the ten frequencies, it is simply impossible from a technical standpoint to provide that all allotments can be implemented without regard to first adjacent channels in other countries. Thus, in general throughout the Region, it will be necessary that the remaining adjacent channel situations be handled via bilateral and/or multilateral agreements between and/or among the affected countries.[21]

25. In the event that such agreements do not exist, or in the event of an unsuccessful application of such agreements, then the most appropriate and effective manner of resolving these situations would be a procedure similar to the one incorporated in International Radio Regulations Nos. 1506 and 1509, with appropriate modifications to apply to the band 1605-1705 kHz. These regulations provide that when coordination has not been successfully effected with respect to the probability of harmful interference, the IFRB will take into account the frequency assignments for transmission or reception already recorded in the Master International Frequency Register.

26. Participants at the Lima CITEL PTC II meeting, noting that the Second Session of the Conference will last less than three weeks, suggested that other intersessional tasks (in addition to completion of the studies discussed above) be undertaken so as to facilitate the work at the Second Session.[22] A suitable resolution requesting that the additional intersessional tasks be carried out has been adopted by CITEL and sent to the IFRB for consideration. It is understood that IFRB will not be able to perform these tasks with its own staff, and as a result, will need assistance from various countries in carrying this effort. The Commission is fully prepared to assist in this effort.

27. In view of the foregoing, and pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, IT IS ORDERED, That the attached Recommendation for United States Proposal to the Second Session IS ADOPTED for submission to the Depatment of State.

28. For further information, please contact Freda Lippert Thyden of the Mass Media Bureau at (202) 254-3394, or John Boursy of the Mass Media Bureau at (202) 634-6315.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

## FOOTNOTES

[1] For simplicity, we shall refer to this Regional Administrative Radio Conference (RARC) as the Expanded Band Conference. Pursuant to Resolution No. 1 of the Plenipotentiary Conference of the International Telecommunication Union Conference (Nairobi, 1982), the Expanded Band Conference was scheduled to be held in two sessions. Its purpose is to implement the action of the 1979 World Administrative Radio Conference which revised portions of the frequency allocation tables of the International Radio Regulations to make this band available for broadcasting on a primary basis in Region 2 (the Western Hemisphere). The use of this band in other areas of the World is beyond the scope of this Conference.

[2] *First Notice of Inquiry*, 49 Fed. Reg. 21419, May 21, 1984; and *Second Notice of Inquiry*, 50 Fed. Reg. 2077, Jan. 15, 1985.

[3] *First Report*, 50 Fed. Reg. 33844, August 21, 1985; and *Second Report*, 51 Fed. Reg. 8706, March 13, 1986.

[4] The Second Session of the Conference is scheduled to take place in Rio de Janeiro, Brazil from May 23 through June 9, 1988.

[5] The final text of the Regional Agreement and the associated Broadcasting Plan are to be included in the Final Acts of the Conference.

[6] 52 Fed. Reg. 27570, July 22, 1987.

[7] Comments also were sought on inter-regional sharing issues that arise because in both Region 1 (Europe and Africa) and Region 3 (Asia and Oceania) this band is used by various non-broadcast services.

[8] Additionally, various meetings were held with other administrations on a bilateral or multilateral basis. Domestically, various federal agencies participated in an Ad Hoc group preparing for the Conference. Finally, the FCC Industry Radio Advisory Committee addressed issues concerning the Expanded Band Conference.

[9] In the *Second Report*, the Commission also adopted a recommendation that a maximum power of 10 kW be used in implementing the Plan.

[10] For a summary of comments filed in response to the *Third Notice*, see Appendix C.

[11] FCC representatives are participating in these studies. In addition, the Commission will continue to meet with other federal agencies on matters of mutual concern. Bilateral and multilateral meetings with other administrations in Region 2 also are anticipated. Likewise, there are meetings of Permanent Technical Committee II (broadcasting) of CITEL to consider issues expected to arise at the Second Session of the Conference.

[12] Although the First Session adopted technical criteria consistent with those applied in the existing band, domestic standards may vary provided other administrations are not adversely affected. It is important to note that there will be little opportunity at the Second Session to modify the technical criteria adopted at the First Session. This is important, as the Commission issued a *Notice of Inquiry* in MM Docket No. 87-267 to review the technical assignment criteria applied domestically to the existing band. Thus, in the *Third Notice*, comment was requested on the desirability of applying any new technical criteria that may be developed as an outgrowth of that proceeding.

[13] Originally, this conference was empowered to deal with broadcasting uses of the expanded band, but by action of the Administrative Council of the ITU, its scope has since been enlarged to cover all uses of the band within the Region. In addition, Resolution No. 953 adopted at the 41st session of the Administrative Council adopted the agenda for the 1988 Space Conference (ORB-88). The agenda includes as item 15 the following: "to consider and, if appropriate, revise No. 480 of the Radio Regulations only to the extent necessary to ensure that implementation of broadcasting stations in Region 2 in the band 1605 - 1705 kHz is without prejudice to the regional broadcasting plan adopted at the Second Session of RARC BC-R2". Appropriate text is to be developed at the Second Session. This situation arises because, unlike World Conferences, Regional Conferences are not empowered to revise the Radio Regulations. As a consequence, the Final Acts of a Regional Conference are not binding as to non-signatories. Thus, a revision of No. 480 by ORB-88 is necessary to ensure that the actions of non-signatories are not in derogation of the broadcasting Plan.

[14] The *Third Notice* observed that one possible model for such action was found in Article 6 of Appendix 30 of the International Radio Regulations. In that Article, terrestrial stations in a band planned by the Broadcasting Satellite (BSS) are made subject to additional procedures. These procedures require that any proposed fixed or mobile service registration be examined by the IFRB to determine if there is a probability of harmful interference to the assignments in the BSS Plan.

[15] International Radio Regulation No. 419 provides that permitted and primary services have equal rights, except that, in the preparation of frequency plans, the primary service, as compared with the permitted service, shall have prior choice of frequencies.

[16] CCIR recommendation 240-3 generally recognizes three service qualities, *i. e.*, good commercial quality, marginal commercial quality, and just usable.

[17] Others operate on 530 kHz, but these stations are outside the scope of the current proceeding.

[18] Allotment planning was chosen because of its much greater flexibility. It allots channels to areas rather than specific locations and thus does not require the specification of facilities in advance. Not only does this permit changes in location or station facilities, it permits multiple uses within allotment areas provided requisite international protection is provided. In addition, the allotment method avoids the need for the extensive coordination otherwise required to resolve the incompatiblities arising out of an assignment plan. Finally, for countries wishing to delay implementation of broadcasting in the new band, allotment planning protects their opportunity to implement stations in the future.

[19] A more detailed explanation of the "pairing" concept and the other aspects of the allotment planning methodology can be found in Appendix B.

[20] Because the planning method is based on a power of one kilowatt, the second-adjacent and third-adjacent considerations are sufficiently reduced so they can generally be ignored in developing the allotment plan. However, they will assume a greater importance in making actual assignments.

[21] In the case of the continental U.S., we anticipate that our excellent bilateral relationships with Canada and Mexico will lead to effective arrangements between us in regard to adjacent channel coordination.

[22] These tasks consist of the following items:

a. Preparation of lists showing how all of the allotment areas are linked to each other, using mixed path distances of 450, 500, and 600 km.

b. Preparations of maps showing stations on 1600, 1590, and 1580 kHz along with their pertinent contours, for assistance in allotting 1610, 1620, and 1630 KHz.

c. Development of draft allotment plans, based on mixed path distances of 450, 500, and 600 km. The draft plans would incorporate the pairing concept described in Appendix B.

APPENDIX A

**PROPOSALS RECOMMENDED BY THE**

**FEDERAL COMMUNICATIONS COMMISSION**

**FOR THE SECOND SESSION OF THE REGION 2**

**ADMINISTRATIVE RADIO CONFERENCE**

**TO PLAN THE USE OF THE BAND 1605 - 1705 KHZ**

**IN REGION 2**

## Introduction

To assist the Conference in carrying out its responsibilities, the United States has developed proposals for an agreement which can accommodate future changes, technical innovation and effective domestic implementation. These proposals are fully consistent with the decisions made at the First Session. These proposals are designed to provide flexibility in the implementation of the allotment plan, thereby permitting the growth of the MF broadcasting service in the 1605-1705 kHz band in the Western Hemisphere.

The United States believes that in order to achieve these objectives, broadcasting standards developed for the expanded band should be consistent with the standards applied to the existing MF broadcasting band. Likewise, appropriate criteria should be adopted for the use of the band by non-broadcast services to ensure that such use is not in derogation of the allotment plan for the broadcast use of the expanded band.

There are several important tasks to be performed at the Second Session of the Conference, involving the development of Final Acts containing the text of the Regional Agreement on the use of the band 1605 - 1705 kHz. The Second Session, originally scheduled for three weeks has been shortened to two weeks and four days. The extremely short duration of the Second Session of the Conference and the enlargement of its scope to encompass all uses of the band, non-broadcast as well as broadcast, emphasizes the need to address the issues before it in the most efficient and expeditious manner. For this reason the United States believes that it would be helpful to the deliberations of the Second Session to have before it a text incorporating proposed revisions identified during the intersessional period. To this end, the United States has developed draft text for consideration by the Conference. It should be noted that the proposed text provides a complete document rather than simply a listing of suggested changes to the Report. It is believed that this approach can facilitate the work of the Conference. Overall, the goal has been to provide a means of facilitating the timely participation of administrations in a full and active manner in the decisions to be reached on the various issues to be resolved at the Conference.

The U.S. Proposal has been developed mainly from the Report to the Second Session of the Conference (First Session, Geneva, 1986) with minor editing and restructuring of the text. It also takes into account work done at meetings of Permanent Technical Committee II (PTC II) of the Interamerican Telecommunications Conference (CITEL), particularly the report of the IFRB on its intersessional work. Thus, the U.S. Proposal consists of a draft Agreement and three annexes. Annex 1 contains the technical data; Annex 2 contains the planning criteria and Annex 3 contains the Plan of allotments and allotments converted to assignments at the Second Session of the Conference. Also, an attempt was made to closely align the structure of the proposed text with the text of the Rio Agreement, 1981. This has been done since the First Session decided that the extended band would be, for all practical purposes, an extension of the existing band with respect to technical criteria. In this

connection, it should be noted that various references to figures or sections have had to be changed to correspond to the new structural arrangement. Also, slight additional restructuring of the text has been made to improve its readability.

## Regional Agreement

For the sake of clarity and to facilitate its consideration, the various sections of the proposed text are discussed briefly to indicate in what respects (if any) they are changed from the draft text developed at the First Session and to explain the purpose behind any changes which are being proposed. In several cases, the changes are solely to clarify existing text or to provide appropriate cross-references. Such is the case with the changes proposed to Article 1, Article 3 and Article 4. In other instances, new ideas are introduced. Such is the case with the Preamble, Article 2 and Article 6, all of which reflect the fact that the scope of the conference has been enlarged to deal with the fixed and mobile as well as broadcast services. A new Article 5 has been added to deal with the procedures to be used to make modifications to the Plan, and an effective date, derived from Recommendation 504 (and referred to in No. 481 of the Radio Regulations), has been inserted in Article 13. Although various changes have been introduced into this draft text, in all respects it is reflective of the intent of the draft text adopted at the First Session.

**Preamble** - Revised to reflect applicability of the agreement to the fixed and mobile services as well as the broadcast service.

**Article 1** - Revised to include cross-references to appropriate annexes.

**Article 2** - Revised to reflect applicability of agreement to fixed and mobile services in the use of frequency band 1625-1705 kHz.

**Article 3** - 3.2 revised to include cross-reference to Article 6.

**Article 4** - 4.1.1.1 has been revised to refer to 2.1 of Annex 2.

4.1.1.2 has been revised to refer to section 4 of Annex 2 which concerns adjacent channel criteria.

4.1.1.3 has been revised to refer to 3.1 and 3.3 of Annex 2.

4.1.2 has been revised to clarify its applicability to cases not coming under the provisions of 4.1.1

4.1.2.2 has been revised to refer to 3.1 of Annex 2.

4.2.1 has been revised to refer to Annex 2.

4.2.1.1 has been revised to make it clear that the allotments appearing in the Plan are to be protected (in accordance with the provisions of Annex 2).

4.2.1.2 has been revised to include protection to fixed and mobile stations recorded in the Master Register with a favorable finding.

4.2.2 has been revised to refer to Annex 2.

4.4 has been revised to include additional language in the the parenthetical in 4.4 to clarify the need to comply with 4.2.2

**Article 5** - New Article setting forth procedures to be used to make modifications to the Plan. Such procedures can facilitate arrangements between administrations to modify their allotments to make the most efficient use of the band while at the same time providing protection to the allotments of other administrations.

**Article 6** - New Article, derived from intersessional work of IFRB, dealing with notifications of non-broadcast assignments. Such provisions are needed now that the scope of the conferences has been enlarged to include non-broadcast uses.

**Article 7** - Former Article 5 (unchanged).

**Article 8** - Former Article 6 (unchanged).

**Article 9** - Former Article 7 (unchanged).

**Article 10** - Former Article 8 (unchanged).

**Article 11** - Former Article 9 (unchanged).

**Article 12** - Former Article 10 (unchanged).

**Article 13** - Former Article 11 revised to specify entry into force at 0001 hours UTC on 1 July, 1990.

**Article 14** - Former Article 12 (unchanged).

## Annexes to the Agreement

The United States has been fully satisfied with with the results embodied in the Report to the Second Session. Therefore, as was the case with the text for the agreement itself, the proposed text for the annexes to the agreement has been derived from the Report and is fully consistent with it. However, it

has been revised as needed to put it in the appropriate structure for inclusion in the final acts of the Conference. This structure has been derived from that used for the Region 2 MF Broadcasting Agreement (Rio de Janeiro, 1981). It should be noted that the United States anticipates the submission of additional proposals on the subject of standardized distances for mixed and sea paths and related planning criteria and on the subject of sharing criteria for broadcast and the fixed and mobile services.

The specific differences between the U.S. Proposal and the technical aspects of the Report are as follows:

- Annex 1 to the draft agreement includes the first five chapters of the Report. Chapters one through four are essentially identical to the Report with only minor changes having been made to these chapters. For instance, language (e.g., "shall be" vs "is") has been modified to reflect the change from a report to be considered by the Conference to text suitable for a final Regional Agreement. Also, the asterisk and note at the beginning of Chapter 3 have been deleted since they are not necessary for the Agreement; and, section 3.5 which reads, "NOT ALLOCATED", has been deleted with the subsequent sections renumbered.

- Appendix 1 to Annex 1, containing the Atlas of Ground Conductivity has been added. This follows the approach taken in the 1981 Rio Agreement. Appendices 2 and 3 contain calculation methods for antenna systems and are as given in the Report.

- Chapter 5 of Annex 1, which is intended to specify sharing criteria pertaining to the fixed and mobile services, is in square brackets in the U.S. proposal. The U.S. anticipates submission of subsequent proposals on this matter.

- Planning criteria which were the subject of chapter 6 in the Report have been incorporated where appropriate into a separate annex, Annex 2. The text has been edited to reflect the work of the recent Panel Of Experts, Geneva (January 1988). Moreover, some sections of the text has been expanded to provide greater specificity and to address several of the permutations that will occur as allotments and non-allotted channels are implemented.

- Included as a separate annex, Annex 3, is the Plan which is to be developed at the second session.

The following discussion identifies each of the proposed changes to the technical annexes and highlights the specific differences between the U.S. Proposal and the Report. It should be noted that the technical portion of the draft U.S. Proposal includes three annexes and three associated appendices.

-- Chapters one through five of the Report have been included in the draft Annex 1, "Technical Data", using the same chapter terminology as the Report. Specific changes from the Report are:

- Section 1.1.16: reference to Annex 2 has been added.

- Section 2.1.1, first paragraph: reference to Appendix 1, Atlas of ground conductivity is added.

- Section 2.2.4: Nocturnal variation of skywave field strength is suppressed since it has no application in the Agreement.

- Section 2.2.2, second paragraph: modified to clarify text and to prescribe use of Figure 2.3a to determine compliance with the Agreement.

- Section 2.2.5 is renumbered as Section 2.2.4.

- Table 2.II was modified to correct title.

- Figure 2.7 is suppressed since it has no application in the Agreement.

- Chapter 3, heading: suppress asterisk and the associated note at bottom of page.

- Section 3.1, paragraph 1, line 1: replace "shall be" with "is".

- Section 3.2, paragraph 1, line 1: replace "shall be" with "is".

- Section 3.2, paragraph 2, line 1: replace "could" with "may".

- Section 3.3, paragraph 1, line 1: replace "shall be" with "is".

- Section 3.4, paragraph 1, line 1: replace "As indicated in" with "In accordance with".

- Section 3.4, paragraph 1, lines 2 and 3: modified to prescribe a frequency tolerance consistent with the maximum power to be permitted.

- Section 3.5: suppress.

- Section 3.6: renumber as Section 3.5.

- Section 3.7: renumber as Section 3.6.

- Section 3.8: renumber as Section 3.7.

- Section 3.8.1: renumber as Section 3.7.1 and replace "shall be" with "is".

- Section 3.8.2: renumber as Section 3.7.2.

  paragraph 1, line 1: replace "shall be" with "is".

  paragraph 2, line 1: replace "shall be" with "is".

- Section 4.1, paragraph 1: modified to refer to Figure 2.3.

  paragraph 3: modified to refer to Figures 2.3a and 2.5 as well as Table 2.II.

- Section 4.2, paragraph 1, line 2: replace "Annex 1" with "Appendix 2".

- Section 4.3.1, paragraph 1, line 1: replace "Annex 2" with "Appendix 3".

- Section 4.3.3, paragraph 1, line 3: replace "Annex 2" with "Appendix 3".

- Chapter 5, heading: place the current text in brackets and add the following language, "[New text to be developed]".

- Add new appendix, Appendix 1, "Atlas of ground conductivity" (not contained in the Report) following Chapter 5.

- Rename Annex 1 of the Report (pp. 61-65) as Appendix 2 (to Annex 1), "Calculation of directional antenna patterns", and place it after Appendix 1.

- Rename Annex 2 of the Report (p. 67) as Appendix 3, "Equations for the calculation of the normalized vertical radiation from top-loaded and typical sectionalized antennas", and place it after Appendix 2.

- Rename Chapter 6 of the Report as "Annex 2 (to the Regional Agreement to establish a Plan for the Broadcasting Service in the Band 1 605 -1 705 kHz in Region 2".

- Add a new annex, Annex 3, "Plan of allotments and allotments converted to assignments", and place it after Annex 2.

DRAFT REGIONAL AGREEMENT FOR THE USE ~~BY THE BROADCASTING SERVICE~~ OF THE BAND 1605 - 1705 KHZ IN REGION 2

PREAMBLE

~~Noting No. 480 of the Radio Regulations, which provides that:~~

~~In~~ Recognizing that in Region 2 the use of the band 1605-1705 kHz by stations of the broadcasting service shall be subject to a Plan to be established by a regional administrative radio conference;

fully respecting the sovereign right of each country to regulate within its territory the use of the frequency band 1605-1705 kHz by the broadcasting service, and to reach special arrangements regarding this service with such countries as it may consider appropriate, without prejudice to other administrations;

seeking to facilitate mutual understanding and cooperation among the Members of Region 2 in achieving a satisfactory broadcasting service in MF band 1605-1705 kHz and, to the extent consistent with the Plan to be established for the broadcast use of this band, to make provision for the Fixed and Mobile use of the band 1625 -1705 kHz;

recognizing that all countries have equal rights, and that, in the application of the Plan and its provisions, the needs of each country, and in particular those of developing countries, shall be met as far as possible, and

acknowledging that mutual protection of the broadcasting service is a major objective of all countries and that mutual protection of the fixed and mobile services in a manner consistent with full protection to the Plan and its provisions is likewise a major objective of all countries, in order to ensure better coordination and the use of more efficient facilities;

the delegates of the Members of the International Telecommunication Union assembled in Rio de Janeiro at a regional administrative conference convened pursuant to the International Telecommunication Convention (Nairobi, 1982), have adopted, subject to approval by the competent authorities of their respective countries, the following provisions relating to the broadcasting service in Region 2 for the frequency band between 1605-1705 kHz.

ARTICLE 1

1. For the purpose of the Agreement, the following terms shall have the meanings defined below.

1.1 Union: The International Telecommunication Union.

1.2 Secretary-General: The Secretary-General of the Union.

1.3 IFRB: The International Frequency Registration Board.

1.4 CCIR: The International Radio Consultative Committee.

1.5 Convention: The International Telecommunication Convention.

1.6 Radio Regulations: The Radio Regulations supplementing the provisions of the Convention.

1.7 Region 2: The geographical area defined in No. 394 of the Radio Regulations, Geneva, 1979.

1.8 Master Register: The Master International Frequency Register.

1.9 Provisions: The provisions adopted herein that are associated with the Plan.

1.10 Agreement: This Instrument and its Annexes.

1.11 Plan: The Allotment Plan in Article ~~6~~ 8 and the associated provisions[1].

1.12 Administration: Any governmental department or service responsible for discharging the obligations undertaken in the Convention and the Radio Regulations.

1.13 Contracting Member: Any member of the Union which has approved the Agreement or acceded to it.

1.14 Affected Administration: An administration within whose territory the signal of a proposed assignment of another administration exceeds the value prescribed in ~~{section 3.5 of this Report}~~ 3.5 of Annex 1.

1.15 Allotment: Entry in the Plan of a designated broadcasting service in an allotment area under the conditions specified in the Plan. Each allotment included in the Plan may be used for one or more assignments using the technical criteria specified in ~~{section 6.3 of this Report}~~ Annex 2.

1.16 Allotment Area: Specifically defined geographical area within a country to which one or more channels are allotted.

---

1 The allotments converted into assignments appear as Part B of the Plan.

## ARTICLE 2

### Frequency Band

2.1 The provision of the Agreement shall apply to the broadcasting service in the frequency band 1605-1705 kHz and to the fixed and mobile services in the frequency band 1625-1705 kHz as allocated to Region 2 under Article 8 of the Radio Regulations.

## ARTICLE 3

### Execution of the Agreement

3.1 The Contracting Members shall adopt for their stations in Region 2 in the frequency band which is the subject of the Agreement the technical characteristics and standards which are in conformity with the Agreement.

3.2 The Contracting Members shall not bring into use frequency assignments except under the conditions set out in Articles 4 and 6 of the Agreement.

3.3 The Contracting Members undertake, to the extent possible, to avoid or to reduce any harmful interference.

## ARTICLE 4

### Implementation of the Plan and Notification of Frequency Assignments in the Broadcasting Service

4.1 Assignments corresponding to an allotted channel

4.1.1 An administration may at any time, without the need for coordination, make assignments corresponding to any of its allotments, at one or more locations within the respective allotment area, provided that:

4.1.1.1 - the characteristics of the assignments are within the standardized parameters given in 2.1 of Annex 2;

4.1.1.2 - the adjacent channel criteria of section 4 of Annex 2 are satisfied;

4.1.1.3 - the criteria of 3.1 and 3.3 of Annex 2 are met in cases where the characteristics of the assignments exceed the values of the standardized parameters.

4.1.2 In cases not coming within the provisions of 4.1.1, an Administration may, after the successful completion of coordination, make assignments corresponding to its allotment, at one or more locations within the respective allotment area, provided that:

4.1.2.1 - where the adjacent channel criteria are not met, coordination has been effected with those administrations concerned;

4.1.2.2 - where in the case the characteristics of the assignment exceed the values of the standardized parameters and the criteria of 3.1 of Annex 2 are not met, coordination has been effected with those administrations concerned.

4.2 Assignments corresponding to channels not allotted to the area

4.2.1 An Administration may at any time, without the need for coordination, make an assignment on a channel not allotted to it provided that the characteristics of the assignment satisfy the criteria set out in Annex 2 with respect to:

4.2.1.1 - the allotments of another administration that are in the Plan, in accordance with provisions in Annex 2; and

4.2.1.2 - any broadcasting, fixed or mobile station of another Region 2 administration that is not assigned on a channel allotted to that administration in the Plan and which has been previously recorded in the Master Register with a favorable finding.

4.2.2 An Administration may make an assignment on a channel not allotted to it, the characteristics of which do not satisfy the criteria set out in Annex 2 with respect to 4.2.1.1 and 4.2.2.2, provided that such use has been successfully coordinated with the affected administration(s).

4.3 When an administration proposes to bring into use an assignment in conformity with the Agreement, it shall notify it to the IFRB in accordance with Article 12 of the Radio Regulations. Any such assignment recorded in the Master Register as a result of the application of Article 12 of the Radio Regulations shall bear a special symbol under the Remarks Column and a date in Column 2a or in Column 2b.

4.4 When the IFRB receives an assignment notice which is not in conformity with the Agreement, (including those in conflict with 4.2.2 above), it shall return the notice to the notifying administration.

4.5 If the notifying administration resubmits the notice with or without modification and insists that it be reconsidered, and if the Board's finding

remains unfavorable, the notice shall be returned to the notifying administration.

## Article 5

## Procedure for Modification of the Plan

5.1 The procedure set forth in this article applies when an administration seeks to modify the Plan to:

- Enter into the Plan a modification of an existing allotment; or

- Enter into the Plan a new allotment.

5.2 An administration seeking modification of the Plan shall obtain the agreement of any affected administration.

5.3 The administration seeking to modify the Plan shall send to the IFRB the information set forth in [ ] regarding such proposed modification. Affected administrations are encouraged to coordinate the development of proposed modifications to the Plan and may file such proposals jointly.

5.4 The IFRB shall determine, on the basis of the separation distances in Annex 3, those administrations whose allotments or assignments are considered as affected and shall publish the information in a special section of its weekly circular.

5.5 The IFRB shall send a telegram to the administrations listed in the special section of the weekly circular as being affected by the proposed modification, drawing their attention to the information it contains, and including the results of the IFRB's calculations.

5.6 The IFRB shall provide an opportunity for affected administrations to provide their comments on the proposed modification. Upon request, to the extent feasible, the IFRB shall provide such additional technical information as may be requested of it by the administration proposing the modification or by administrations which would be affected by it. In order to be considered, such request shall be received no later than 60 days following the date of the circular letter announcing the proposed modification.

5.7 In order to be considered, such comments shall be received by the IFRB no later than 60 days from the date of the circular letter announcing the proposed modification. Provided, however, that upon request by an affected administration, this date may be extended by a period of up to 90 days to permit the consideration of additional information requested from the IFRB under paragraph 5.6.

5.8 In the event no comments are received within the 60-day period set forth in 5.7 (or such additional period as is provided to an affected administration in accordance with 5.7), the affected administrations are deemed to have agreed to the proposed modification.

5.9. If, in seeking the agreement of affected administrations, the proposing adminstration modifies its original proposal, the procedures set forth above shall be followed with regard to any adminstration that has not already indicated to the IFRB their agreement to the modification.

5.10 The IFRB shall publish in a special section of its weekly circular the modifications to the Plan which shall have been effectuated, setting forth the administrations and allotments affected thereby. Such modifications shall be entered into the Plan and shall be considered as being in conformity with the Plan and shall be accorded the same status as allotments already appearing in the Plan.

## ARTICLE 6

### Notification of Assignments to Stations of the Fixed and Mobile Services

6.1 When an administration proposes to bring into use an assignment to a station in the Fixed and Mobile Services, it shall notify it to the Board in accordance with Article 12 of the Radio Regulations.

6.2 Upon receipt of such a notice the Board shall in accordance with RR1245 also examine it to determine if it meets the criteria contained in Annex 1 to this agreement.

6.3 If the Board's finding under 6.2 is unfavorable the notice shall be returned to the administration.

6.4 If the administration resubmits the notice with modifications and the finding under 6.2 is still unfavorable, the notice shall be returned to the administration.

6.5 Any such assignment recorded in the Master Register as a result of the application of Article 12 of the Radio Regulations and this article of the Agreement shall bear a special symbol in the Remarks Column and a date in Column 2a or 2b.

## ARTICLE 5 7

### Special Arrangements

7.1 In order to supplement the procedures laid down in these Provisions, or to facilitate the coordination provided for in Article 4, administrations may conclude or continue special arrangements in conformity with the applicable provisions of the Convention and the Radio Regulations.

## ARTICLE 6 8

### Plan

[Part A: consists of the allotments in the Region-wide Allotment Plan.

Part B: consists of the assignments developed at the Second Session by administrations converting their allotments to assignments.]

## ARTICLE 7 9

### Scope of Application of the Agreement

9.1 The Agreement is binding upon the Contracting Members in their mutual relations, but not in their relations with non-contracting countries.

9.2 Should a Contracting Member formulate reservations on the application of any provision of the Agreement, the other Contracting Members shall be free to disregard that provision in their relations with the Member that has made the reservations.

## ARTICLE 8 10

### Approval of the Agreement

10.1 The signatory Members shall notify the Secretary-General of their approval of this Agreement as soon as possible by depositing an instrument of approval; the Secretary-General shall immediately inform the other Members of the Union.

## ARTICLE ~~9~~ 11

### Accession to the Agreement

11.1 Any Member of the Union in Region 2 which has not signed the Agreement may accede to it at any time by depositing an instrument of accession with the Secretary-General, who shall immediately inform the other Members of the Union. Accession shall apply to the Plan as it stands at the time of accession and shall be made without reservation.

11.2 Accession to the Agreement shall become effective on the date on which the instrument of accession is received by the Secretary-General.

## ARTICLE ~~10~~ 12

### Denunciation of the Agreement

12.1 Any Contracting Member may denounce the Agreement at any time by a notification sent to the Secretary-General, who shall inform the other Members of the Union.

12.2 Denunciation shall become effective one year after the date on which the Secretary-General receives the notification of denunciation.

## ARTICLE ~~11~~ 13

### Entry into Force of the Agreement

13.1 The Agreement shall enter into force on 1 July, 1990, at 0001 hours UTC.

## ARTICLE ~~12~~ 14

### Duration of the Agreement

14.1 The Agreement shall remain in force until revised by a competent administrative radio conference.

**ANNEX 1**

**to the Regional Agreement**
**to establish a Plan for the**
**Broadcasting Service in the Band 1 605 - 1 705 kHz**
**in Region 2**

**TECHNICAL DATA**

**to be used in the application of the Agreement**

## CHAPTER 1 - DEFINITIONS, SYMBOLS AND UNITS

### 1.1 Definitions

In addition to the definitions given in the Radio Regulations, the following definitions and symbols apply.

#### 1.1.1 Broadcasting channel (AM)

A part of the frequency spectrum, equal to the necessary bandwidth of AM sound broadcasting stations, and characterized by the nominal value of the carrier frequency located at its centre.

#### 1.1.2 Nominal usable field strength ($E_{nom}$)

Agreed minimum value of the field strength required to provide satisfactory reception, under specified conditions, in the presence of atmospheric noise, man-made noise and interference from other transmitters. The value of nominal usable field strength has been employed as the reference for planning.

#### 1.1.3 Service area

The area delimited by the contour within which the calculated level of the groundwave field strength is protected from objectionable interference in accordance with the provisions of Chapter 3.

#### 1.1.4 Audio-frequency (AF) signal-to-interference ratio

The ratio (expressed in decibels) between the values of the voltage of the wanted signal and the voltage of the interfering signal, measured under specified conditions, at the audio-frequency output of the receiver. These specified conditions include various parameters such as the frequency separation between the wanted carrier and the interfering carrier, the emission characteristics (type and percentage of modulation etc.), levels of input and output of the receiver and its characteristics (selectivity, sensitivity to intermodulation, etc.).

#### 1.1.5 Audio-frequency (AF) protection ratio

Agreed minimum value of the audio-frequency signal-to-interference ratio corresponding to a subjectively defined reception quality.

#### 1.1.6 Radio-frequency (RF) signal-to-interference ratio

The ratio (expressed in decibels) between the values of the radio-frequency voltage of the wanted signal and of the interfering signal, measured at the input of the receiver under specified conditions. These specified

conditions include various parameters such as the frequency separation between the wanted carrier and the interfering carrier, the emission characteristics (type and percentage of modulation etc.), levels of input and output of the receiver and its characteristics (selectivity, sensitivity to intermodulation, etc.).

1.1.7 Radio-frequency (RF) protection ratio

The radio-frequency signal-to-interference ratio which, in well-defined conditions, makes it possible to obtain the audio-frequency protection ratio at the output of a receiver. These specified conditions include various parameters such as the frequency separation between the wanted carrier and the interfering carrier, the emission characteristics (type and percentage of modulation, etc.), levels of input and output of the receiver and its characteristics (selectivity, sensitivity to intermodulation, etc.).

1.1.8 Relative radio-frequency protection ratio

This ratio is the difference (expressed in decibels) between the protection ratio when the carriers of the wanted and unwanted transmitters have a frequency difference of $\Delta f$ (Hz or kHz) and the protection ratio when the carriers of these transmitters have the same frequency.

1.1.9 Daytime operation

Operation between the times of sunrise and sunset at the transmitter site.

1.1.10 Night-time operation

Operation between the times of sunset and sunrise at the transmitter site.

1.1.11 Station power

Unmodulated carrier power supplied to the antenna.

1.1.12 Groundwave

Electromagnetic wave which is propagated along or near the surface of the Earth and which has not been reflected by the ionosphere.

1.1.13 Skywave

Electromagnetic wave which has been reflected by the ionosphere.

1.1.14 Skywave field strength, 50% of the time

The skywave field strength during the reference hour which is exceeded for 50% of the nights of the year. The reference hour is the period of one hour beginning one and a half hours after sunset and ending two and a half hours after sunset at the midpoint of the short great-circle path.

1.1.15 Characteristic field strength ($E_c$)

The field strength, at a reference distance of 1 km in a horizontal direction, of the groundwave propagated along perfectly conducting ground for 1 kW station power, taking into account losses in a real antenna.

Note 1 - The gain (G) of the transmitting antenna relative to an ideal short vertical antenna is given in dB by the equation:

$$G = 20 \log \frac{E_c}{300} \qquad (1)$$

where:

$E_c$ is expressed in mV/m.

Note 2 - The effective monopole radiated power (e.m.r.p.) is given in dB (kW) by the following equation:

$$\text{e.m.r.p.} = 10 \log P_t + G \qquad (2)$$

where:

$P_t$: station power (kW).

MOD 1.1.16 Allotment

Entry in the Plan of a designated broadcasting channel for use by an administration for the broadcasting service in an allotment area under the conditions specified in the Plan. Each allotment included in the Plan may be used for one or more assignments using the ~~technical~~ planning criteria specified in ~~section 6.3~~ Annex 2.

1.1.17 Allotment area

Specifically defined geographical area within a country to which one or more channels are allotted.

## 1.2 Symbols and units

| | |
|---|---|
| Hz: | hertz |
| kHz: | kilohertz |
| W: | watt |
| kW: | kilowatt |
| mV/m: | millivolt/metre |
| μV/m: | microvolt/metre |
| dB: | decibel |
| dB(μV/m): | decibels with respect to 1 μV/m |
| dB(kW): | decibels with respect to 1 kW |
| mS/m: | millisiemens/metre |
| σ : | ground conductivity |

## CHAPTER 2 - PROPAGATION

### 2.1 Groundwave propagation

#### 2.1.1 Ground conductivity

MOD For groundwave propagation calculations in the band 1 605 - 1 705 kHz, use shall be made of the Atlas of Ground Conductivity (see Appendix 1), which contains information communicated to the IFRB in connection with the first and second sessions of the Regional Administrative MF Broadcasting Conference (Region 2), (Buenos Aires, 1980 and Rio de Janeiro, 1981), and subsequent modifications.

The following provisions should also be included:

a) When an administration notifies to the IFRB data intended to modify the Atlas, the IFRB shall so inform all administrations of Region 2. After 90 days from the date on which this information is communicated by the IFRB, the IFRB shall modify the Atlas and communicate the modifications to all administrations.

b) No assignment or allotment in the Plan shall at any time require modification as a result of the incorporation of these new data.

c) Any proposal to modify the Plan shall be considered on the basis of the values appearing in the Atlas on the date the proposal was received by the IFRB.

#### 2.1.2 Field strength curves for groundwave propagation

The curves shown in Figure 2.1 shall be used for determining groundwave propagation in the frequency range 1 605 - 1 705 kHz; these curves are computed for 1 655 kHz.

The curves are labelled with ground conductivities in millisiemens/metre. All curves, except the 5000 mS/m (sea water) curve, are derived for a relative dielectric constant of 15. The sea water curve is derived for a relative dielectric constant of 80.

Annex E to the Report by the first session of the Regional Administrative MF Broadcasting Conference (Region 2) (Buenos Aires, 1980) contains a mathematical discussion relating to the calculation of the groundwave curves. The corresponding computer program is available at the IFRB.

#### 2.1.3 Calculation of groundwave field strength

Using the Atlas of Ground Conductivity, the relevant conductivity or conductivities for the chosen path are determined. If only one conductivity is

representative, the method for homogeneous paths is used. If several conductivities are involved, the method for non-homogeneous paths is used.

2.1.3.1 Homogeneous paths

The vertical component of the field strength for a homogeneous path is represented in Figure 2.1 as a function of distance, for various values of ground conductivity.

The distance in kilometres is shown on a logarithmic scale on the abscissa. The field strength is shown on a linear scale on the ordinate in decibels above 1 μV/m. The graph is standardized for a characteristic field strength of 100 mV/m corresponding to an effective monopole radiated power (e.m.r.p.) of -9.5 dB relative to 1 kW. The straight line marked "100 mV/m at 1 km" is the field strength on the assumption that the antenna is erected on a surface of perfect conductivity.

For omnidirectional antenna systems having a different characteristic field strength, correction must be made according to either of the following equations:

$$E = E_0 \times \frac{E_c}{100} \times \sqrt{P}$$

if field strengths are expressed in mV/m, or:

$$E = E_0 + E_c - 100 + 10 \log P$$

if field strengths are expressed in dB (μV/m)

For directional antenna systems, correction must be made according to either of the following equations:

$$E = E_0 \times \frac{E_R}{100}$$

if field strengths are expressed in mV/m, or:

$$E = E_0 + E_R - 100$$

if field strengths are expressed in dB (μV/m),

where:

$E$ : resulting field strength

$E_0$ : field strength read from Figure 2.1

$E_R$ : actual field strength at a particular azimuth at 1 km

$E_c$ : characteristic field strength

P : station power in kW.

Figure 2.2 consists of three pairs of scales to be used with Figure 2.1. Each pair contains one scale labelled in decibels and another in millivolts per metre. Each pair can be cut out and trimmed as a unit to be used as sliding ordinate scales. The scales allow graphical conversion between decibels and millivolts per metre, and are used to make graphical determinations of field strengths. Other methods of making calculations on Figure 2.1 may be used, including the use of dividers to adjust for values of $E_R$ that differ from 100 mV/m at 1 km. However, any method used will follow steps similar to those described below.

For both omnidirectional and directional antenna systems the value of $E_R$ must be found. For omnidirectional systems $E_R$ can be determined by using either of the following equations:

$$E_R = E_c \sqrt{P}$$

if field strengths are expressed in mV/m, or:

$$E_R = E_c + 10 \log P$$

if field strengths are expressed in dB (μV/m)

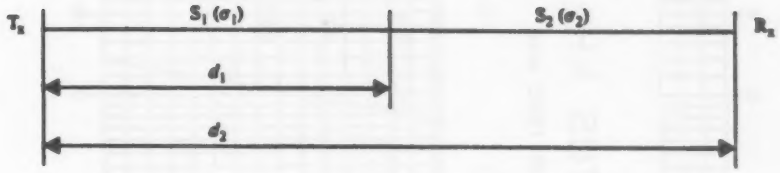
To determine the field strength at a given distance, the scale is placed at that distance with the 100 dB (μV/m) point of the scale resting on the appropriate conductivity curve. The value of $E_R$ is then found on the scale; the point on the underlying graph (which lies underneath the $E_R$ point of the scale) yields the field strength at the given distance.

To determine the distance at a given field strength, the $E_R$ value is found on the sliding scale and that point is placed directly at the level of the given field strength on the graph. The scale is then moved horizontally until the 100 dB (μV/m) point of the scale coincides with the applicable conductivity curve. The distance may then be read from the abscissa of the graph.

2.1.3.2 Non-homogeneous paths

In this case, the equivalent distance or Kirke method shall be used. To apply this method, Figure 2.1 can also be used.

Consider a path whose sections $S_1$ and $S_2$ have lengths $d_1$ and $d_2 - d_1$, and conductivities $\sigma_1$ and $\sigma_2$ respectively, as shown on the following figure:




The method is applied as follows.

a) Taking section $S_1$ first, we read the field strength corresponding to conductivity $\sigma_1$ at distance $d_1$ on Figure 2.1.

b) As the field strength remains constant at the point of discontinuity, the value immediately after the discontinuity must be equal to that obtained in a) above. As the conductivity of the second section is $\sigma_2$, the curve corresponding to conductivity $\sigma_2$ gives the equivalent distance to that which would be obtained at the same field strength arrived at in a). This equivalent distance is d. Distance d is larger than $d_1$ when $\sigma_2$ is larger than $\sigma_1$. Otherwise d is less than $d_1$.

c) The field strength at the real distance $d_2$ is determined by taking the corresponding curve for conductivity $\sigma_2$ and reading off the field strength obtained at the equivalent distance $d + (d_2 - d_1)$.

d) For successive sections with different conductivities, procedures b) and c) are repeated.

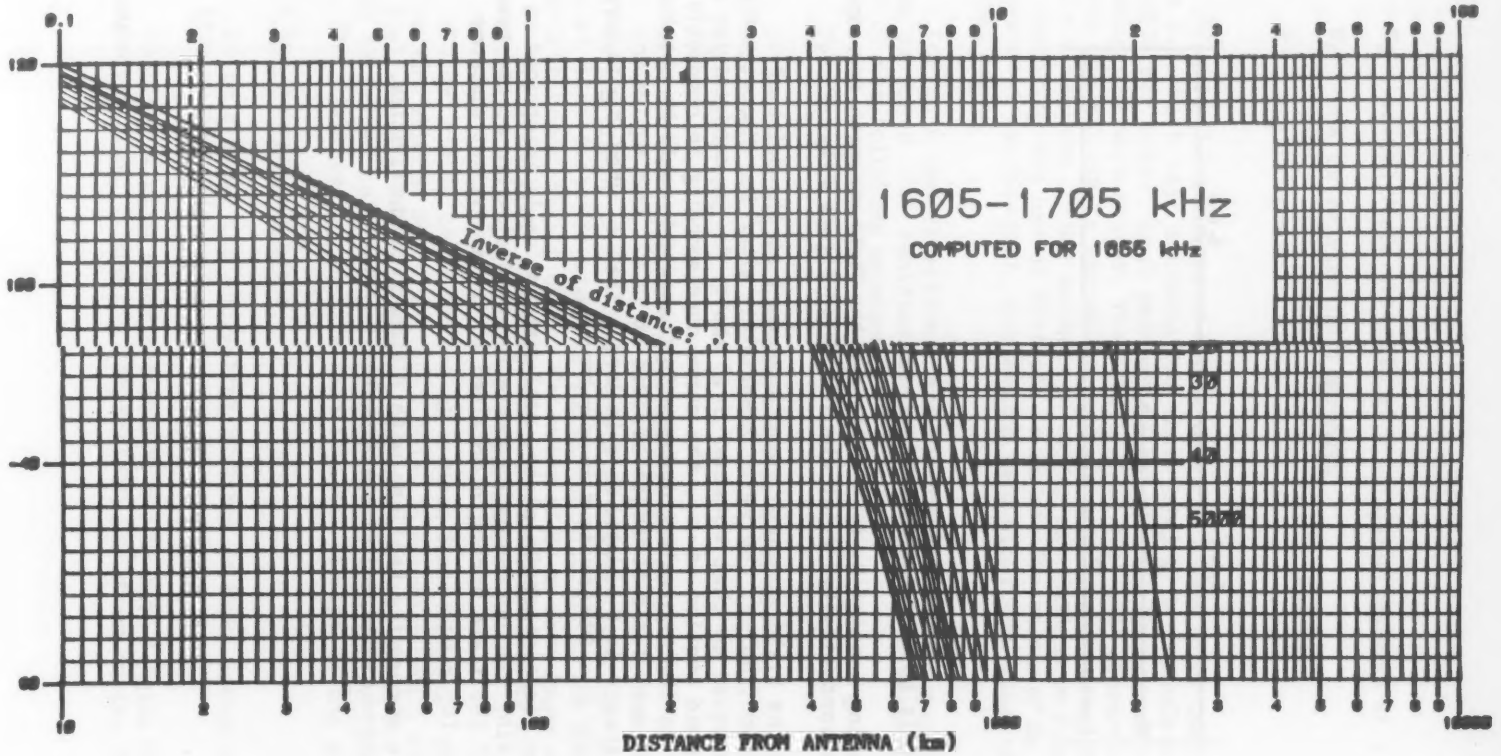



FIGURE 2.1

Groundwave field strength versus distance
(for a characteristic field strength of 100 mV/m)

FIGURE 2.2

Scales for use with Figure 2.1

## 2.2 Skywave propagation

NOC The calculation of skywave field strength shall be conducted in accordance with the provisions which follow.

NOC 2.2.1 List of symbols

d: short great-circle path distance (km)

$E_c$: characteristic field strength, mV/m at 1 km for 1 kW

f(θ): radiation as a fraction of the value θ=0(when θ=0, f(θ)=1)

f: frequency (kHz)

F: unadjusted annual median skywave field strength, in dB (μV/m)

$F_c$: field strength read from Fig. 2.6 or Table 2.III for a characteristic field strength of 100 mV/m

F(50): skywave field strength, 50% of the time, in dB(μV/m)

P: station power (kW)

θ: elevation angle from the horizontal (degrees)

### 2.2.2 General procedure

NOC Radiation in the horizontal plane of an omnidirectional antenna fed with 1 kW (characteristic field strength, $E_c$) is known either from design data or, if the actual design data are not available, from Fig. 2.3, included for information.

MOD However, Figure 2.3a which shows the characteristic field strength of an antenna based on a 1 ohm resistance loss, ~~as currently used by the IFRB in the framework of the Rio de Janeiro Agreement, 1981. This figure~~ shall be used ~~for compatibility calculations.~~ for calculations to determine compliance with the Agreement.

NOC Elevation angle θ is given by

NOC $$\theta = \arctan\left(0.00752 \cot \frac{d}{444.54}\right) - \frac{d}{444.54} \quad \text{degrees} \qquad (1)$$

$$0° \leq \theta \leq 90°$$

NOC Alternatively, Fig. 2.4 or Table 2.I may be used.

It is assumed that the Earth is a smooth sphere with an effective radius of 6,367.6 km and that reflections occur from an ionospheric height of 96.5 km.

The radiation f(θ) expressed as a fraction of the value at θ = 0 at a pertinent elevation angle θ can be deterimined from Fig. 2.5 or Table 2.II.

The product $E_c f(\theta) \sqrt{P}$ is thus determined for an omnidirectional antenna. For a directional antenna $E_c f(\theta) \sqrt{P}$ can be determined from the antenna radiation pattern. $E_c f(\theta) \sqrt{P}$ is the field strength at 1 km at the appropriate elevation angle and azimuth.

The unadjusted annual median skywave field strength F is given by:

$$F = F_c + 20 \log \frac{E_c f(\theta) \sqrt{P}}{100} \quad dB(\mu V/m) \qquad (2)$$

where $F_c$ is the direct reading from the field strength curve in Fig. 2.6 or Table 2.III.

Note: Values of $F_c$ in Fig. 2.6 and Table 2.III are normalized to 100 mV/m at 1 km corresponding to an effective monopole radiated power (e.m.r.p.) of -9.5 dB(kW).

For distances greater than 4250 km, it should be noted that $F_c$ can be expressed by:

$$F_c = \frac{231}{3 + d/1000} - 35.5 \quad dB(\mu V/m) \qquad (3)$$

2.2.3 Skywave field strength, 50% of the time

This is given by:

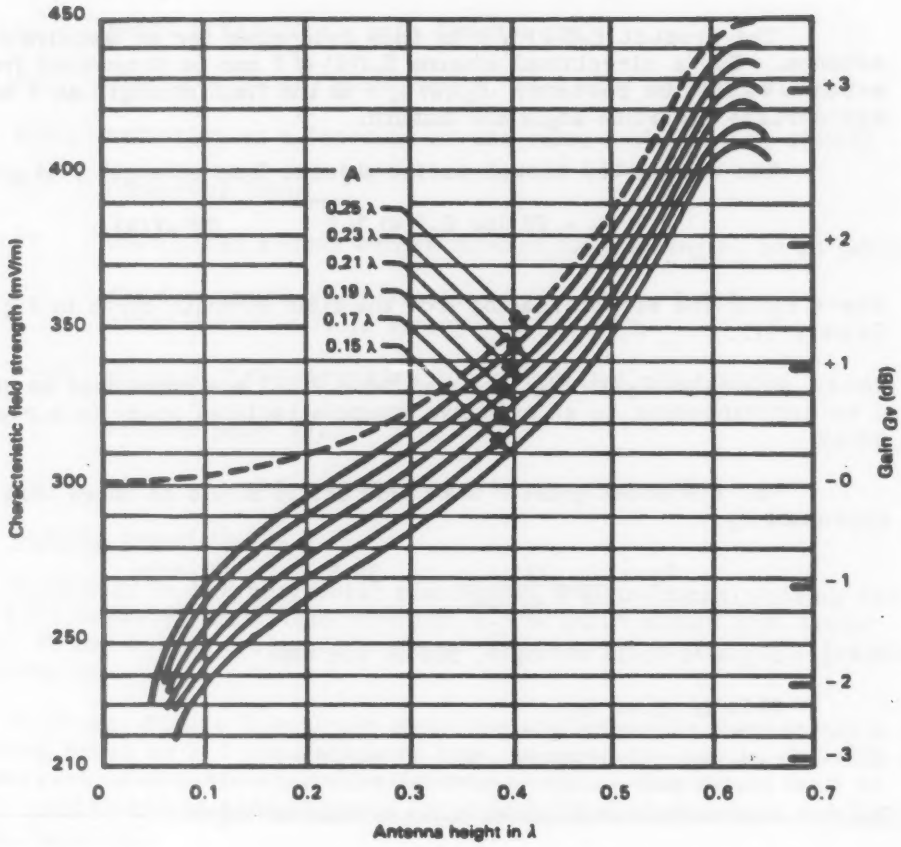
$$F(50) = F \quad dB(\mu V/m) \qquad (4)$$

SUP 2.2.4---Nocturnal-variation-of-skywave-field-strength----------

~~Hourly-median-skywave-field-strengths-vary-during-the-night-and-at sunrise-and-sunset.--Figure-2.7-shows-the-average-variation-referred-to-the value-at-2-hours-after-sunset-at-the-path-midpoint.--This-variation-applies to-field-strengths-occuring-for-50%-of-the-nights.~~

MOD 2.2.5 2.2.4 Sunrise and sunset time

To facilitate the determination of the local time of sunrise and sunset, Fig. ~~2.8~~ 2.7 gives the times for various geographical latitudes and for each month of the year. The time is the local meridian time at the point concerned and should be converted to the appropriate standard time.




A: Radius of ground system
Full lines: Real antenna correctly designed
Dashed line: Ideal antenna on a perfectly conducting ground

**FIGURE 2.3 - Characteristic field strengths for simple vertical antennas using 120-radial ground systems**

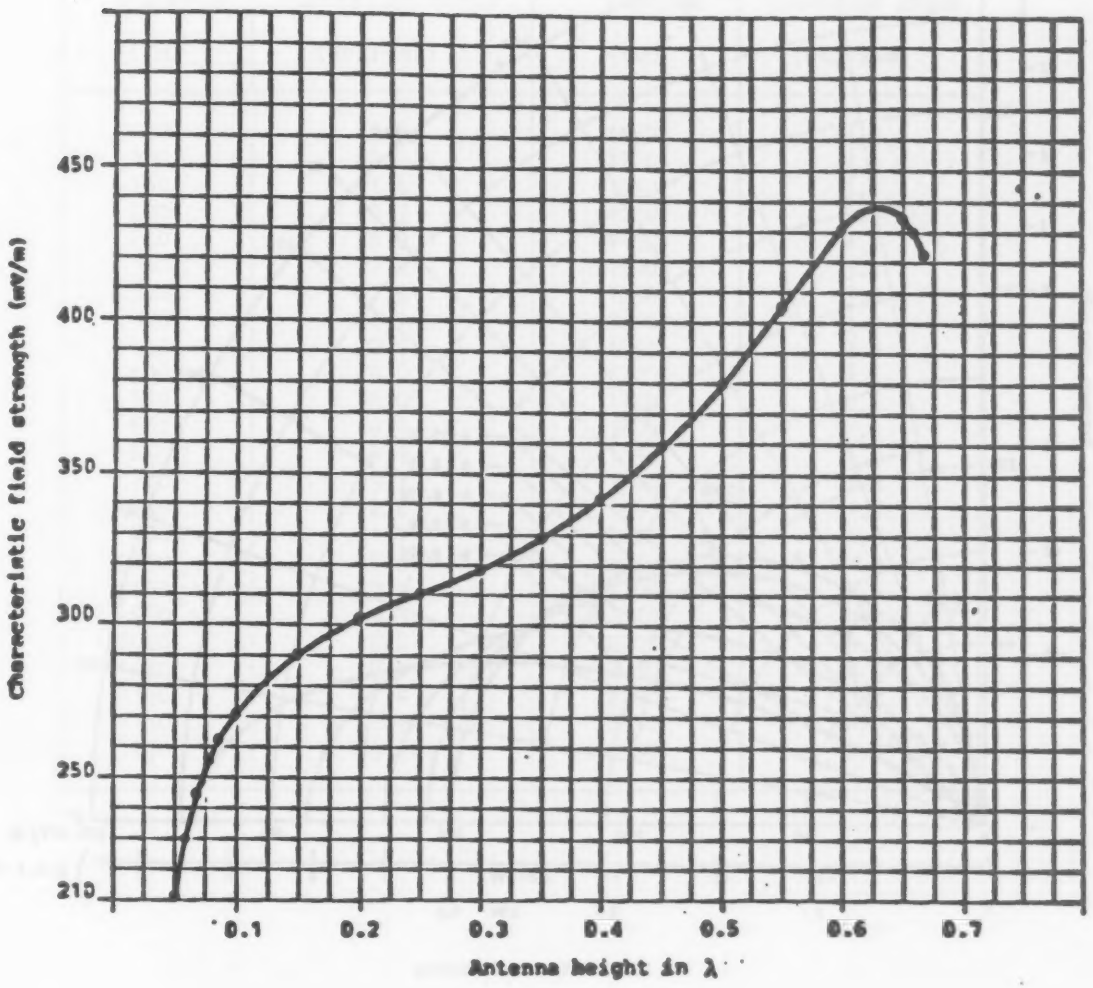
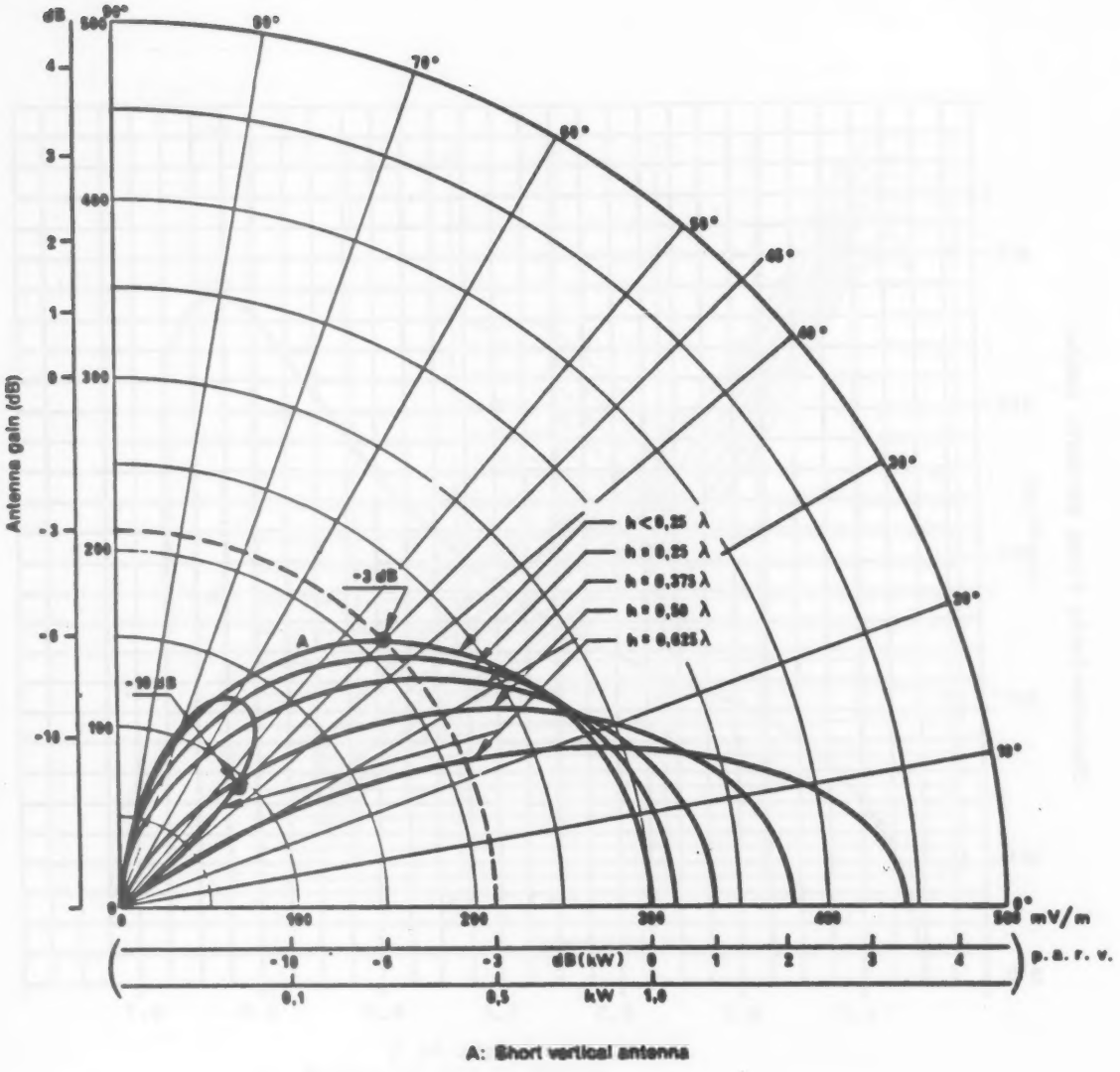



FIGURE 2.3a

Characterisic field strength of an antenna, based on a 1 ohm resistance loss




A: Short vertical antenna

FIGURE 2.3b - Effective monopole radiated power (e.m.r.p.) and field strength at a distance of 1 km as a function of elevation angle, for different heights of vertical antennas assuming a transmitter power of 1 kW

TABLE 2.I - Elevation angle vs distance

| Distance (km) | Elevation angle (degrees) | Distance (km) | Elevation angle (degrees) |
|---|---|---|---|
| 50 | 75.3 | 1250 | 5.9 |
| 100 | 62.2 | 1300 | 5.4 |
| 150 | 51.6 | 1350 | 5.0 |
| 200 | 43.3 | 1400 | 4.6 |
| 250 | 36.9 | 1450 | 4.3 |
| 300 | 31.9 | 1500 | 3.9 |
| 350 | 27.9 | 1550 | 3.5 |
| 400 | 24.7 | 1600 | 3.2 |
| 450 | 22.0 | 1650 | 2.9 |
| 500 | 19.8 | 1700 | 2.6 |
| 550 | 18.0 | 1750 | 2.3 |
| 600 | 16.3 | 1800 | 2.0 |
| 650 | 14.9 | 1850 | 1.7 |
| 700 | 13.7 | 1900 | 1.5 |
| 750 | 12.6 | 1950 | 1.2 |
| 800 | 11.7 | 2000 | 1.0 |
| 850 | 10.8 | 2050 | 0.7 |
| 900 | 10.0 | 2100 | 0.5 |
| 950 | 9.3 | 2150 | 0.2 |
| 1000 | 8.6 | 2200 | 0.0 |
| 1050 | 8.0 | 2250 | 0.0 |
| 1100 | 7.4 | 2300 | 0.0 |
| 1150 | 6.9 | 2350 | 0.0 |
| 1200 | 6.4 | 2400 | 0.0 |

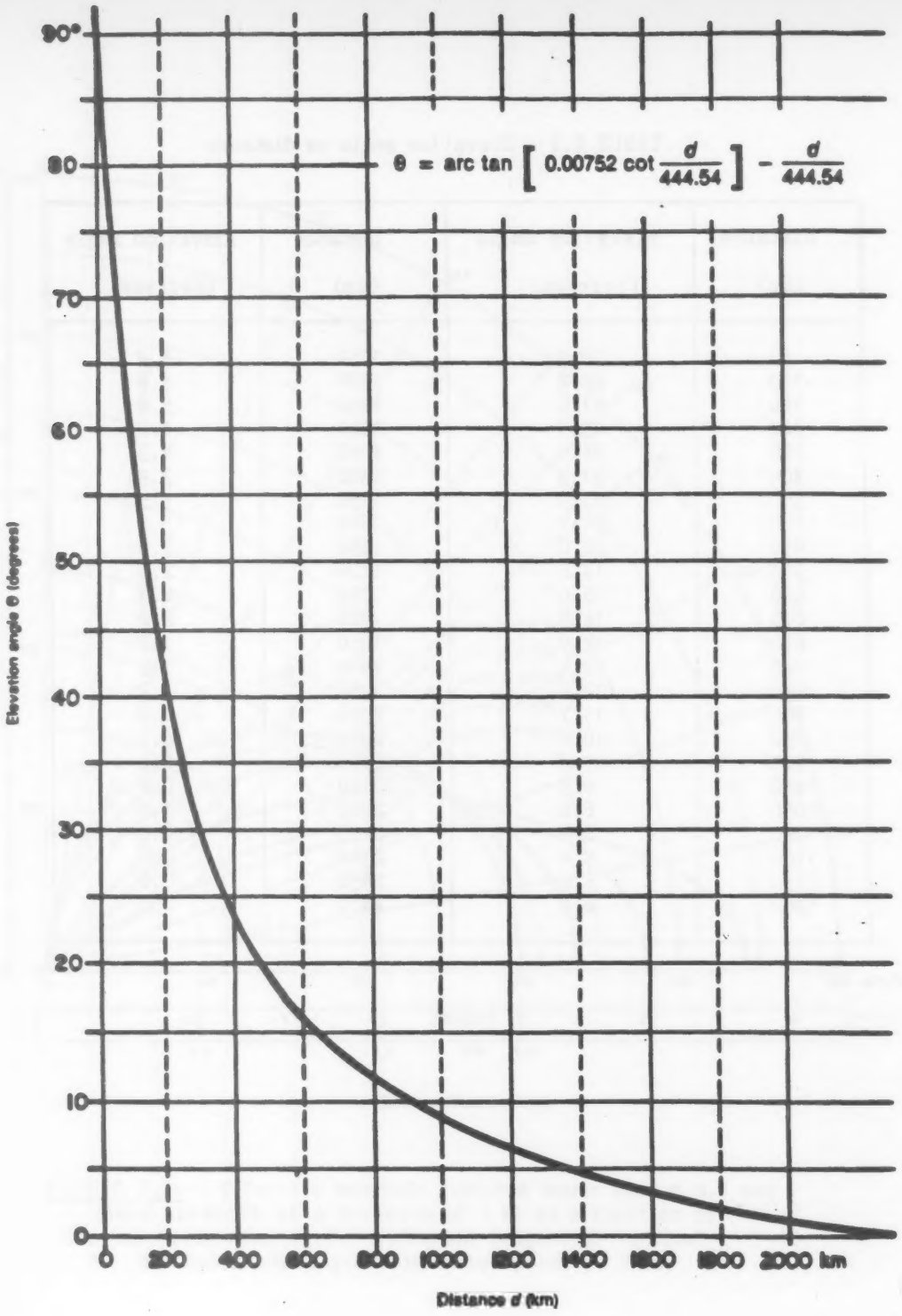



FIGURE 2.4 - Elevation angle vs distance

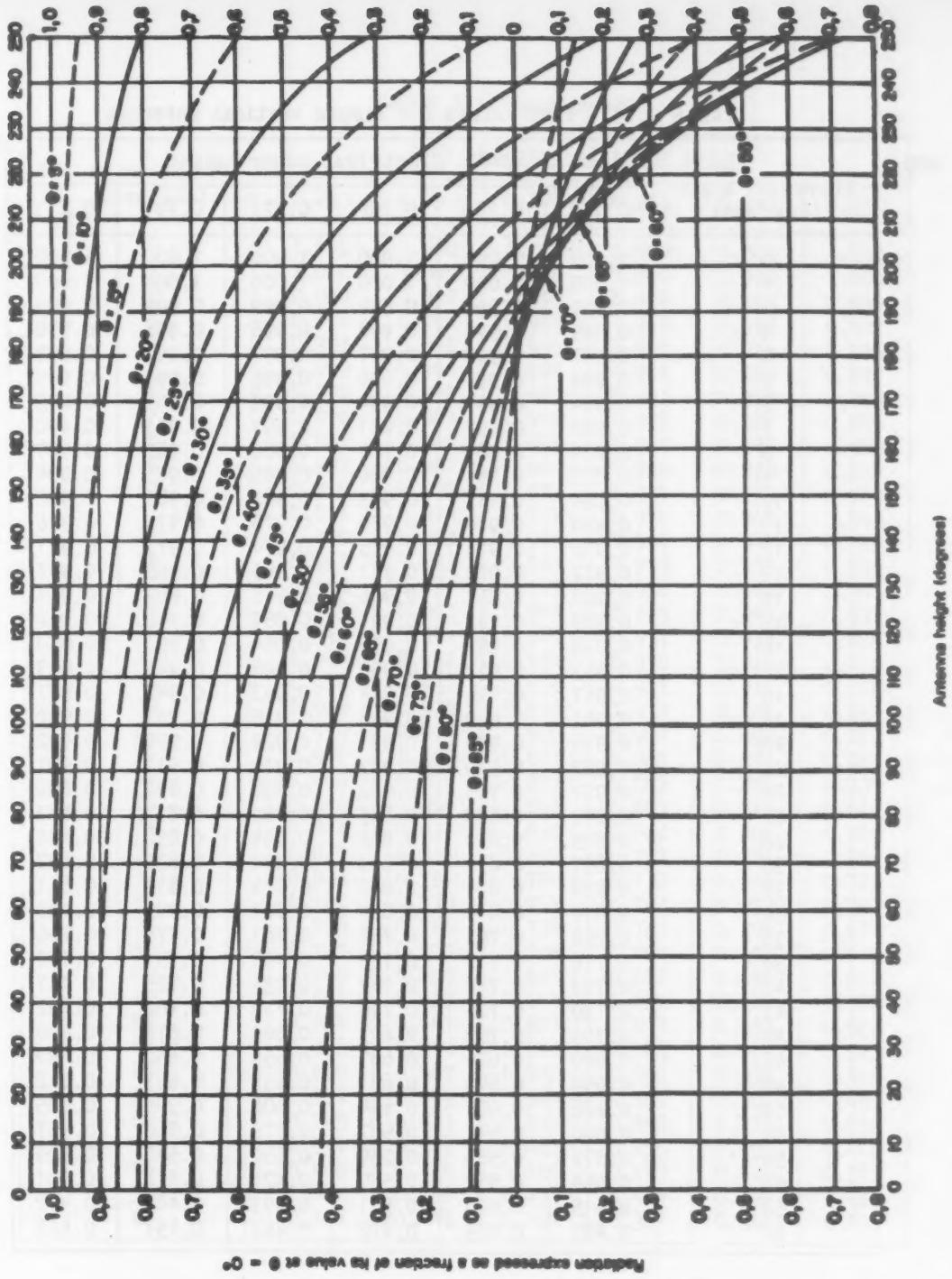



FIGURE 2.5 - Vertical plane radiation of simple vertical antennas as a function of electrical tower height for various values of elevation angle (θ)

MOD

TABLE 2.II - f(θ) values for simple vertical antennas

| Elevation angle (degrees) | ~~f(θ)~~ Electrical tower height | | | | | |
|---|---|---|---|---|---|---|
| | 0.11λ | 0.13λ | 0.15λ | 0.17λ | 0.19λ | 0.21λ |
| 0 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |
| 1 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |
| 2 | 0.999 | 0.999 | 0.999 | 0.999 | 0.999 | 0.999 |
| 3 | 0.999 | 0.998 | 0.998 | 0.998 | 0.998 | 0.998 |
| 4 | 0.997 | 0.997 | 0.997 | 0.997 | 0.997 | 0.997 |
| 5 | 0.996 | 0.996 | 0.996 | 0.995 | 0.995 | 0.995 |
| 6 | 0.994 | 0.994 | 0.994 | 0.993 | 0.993 | 0.993 |
| 7 | 0.992 | 0.992 | 0.991 | 0.991 | 0.991 | 0.990 |
| 8 | 0.989 | 0.989 | 0.989 | 0.988 | 0.988 | 0.987 |
| 9 | 0.987 | 0.986 | 0.986 | 0.985 | 0.985 | 0.984 |
| 10 | 0.984 | 0.983 | 0.983 | 0.982 | 0.981 | 0.980 |
| 11 | 0.980 | 0.980 | 0.979 | 0.978 | 0.977 | 0.976 |
| 12 | 0.976 | 0.976 | 0.975 | 0.974 | 0.973 | 0.971 |
| 13 | 0.972 | 0.972 | 0.971 | 0.969 | 0.968 | 0.967 |
| 14 | 0.968 | 0.967 | 0.966 | 0.965 | 0.963 | 0.961 |
| 15 | 0.963 | 0.962 | 0.961 | 0.959 | 0.958 | 0.956 |
| 16 | 0.958 | 0.957 | 0.956 | 0.954 | 0.952 | 0.950 |
| 17 | 0.953 | 0.952 | 0.950 | 0.948 | 0.945 | 0.943 |
| 18 | 0.947 | 0.946 | 0.944 | 0.942 | 0.940 | 0.937 |
| 19 | 0.941 | 0.940 | 0.938 | 0.935 | 0.933 | 0.930 |
| 20 | 0.935 | 0.933 | 0.931 | 0.929 | 0.926 | 0.922 |
| 22 | 0.922 | 0.920 | 0.917 | 0.914 | 0.911 | 0.907 |
| 24 | 0.907 | 0.905 | 0.902 | 0.898 | 0.894 | 0.890 |
| 26 | 0.892 | 0.889 | 0.885 | 0.882 | 0.877 | 0.872 |
| 28 | 0.875 | 0.872 | 0.868 | 0.864 | 0.858 | 0.852 |
| 30 | 0.857 | 0.854 | 0.849 | 0.844 | 0.839 | 0.832 |
| 32 | 0.838 | 0.834 | 0.830 | 0.824 | 0.818 | 0.811 |
| 34 | 0.819 | 0.814 | 0.809 | 0.803 | 0.795 | 0.789 |
| 36 | 0.798 | 0.793 | 0.788 | 0.781 | 0.774 | 0.766 |
| 38 | 0.776 | 0.771 | 0.765 | 0.758 | 0.751 | 0.742 |
| 40 | 0.753 | 0.748 | 0.742 | 0.735 | 0.725 | 0.717 |
| 42 | 0.730 | 0.724 | 0.718 | 0.710 | 0.702 | 0.692 |
| 44 | 0.705 | 0.700 | 0.693 | 0.685 | 0.676 | 0.666 |
| 46 | 0.680 | 0.674 | 0.667 | 0.659 | 0.650 | 0.639 |
| 48 | 0.654 | 0.648 | 0.641 | 0.633 | 0.623 | 0.612 |
| 50 | 0.628 | 0.621 | 0.614 | 0.606 | 0.596 | 0.585 |
| 52 | 0.600 | 0.594 | 0.587 | 0.578 | 0.568 | 0.557 |
| 54 | 0.572 | 0.566 | 0.559 | 0.550 | 0.540 | 0.529 |
| 56 | 0.544 | 0.537 | 0.530 | 0.521 | 0.512 | 0.501 |
| 58 | 0.515 | 0.508 | 0.501 | 0.493 | 0.483 | 0.472 |
| 60 | 0.485 | 0.479 | 0.472 | 0.463 | 0.454 | 0.443 |

MOD

TABLE 2.II (continued)

| Elevation angle (degrees) | ~~f(0)~~ Electrical tower height | | | | | |
|---|---|---|---|---|---|---|
| | 0.23 λ | 0.25 λ | 0.27λ | 0.29λ | 0.311 λ | 0.35 λ |
| 0 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |
| 1 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |
| 2 | 0.999 | 0.999 | 0.999 | 0.999 | 0.999 | 0.999 |
| 3 | 0.998 | 0.998 | 0.998 | 0.998 | 0.998 | 0.997 |
| 4 | 0.997 | 0.996 | 0.996 | 0.996 | 0.996 | 0.995 |
| 5 | 0.995 | 0.994 | 0.994 | 0.994 | 0.993 | 0.992 |
| 6 | 0.992 | 0.992 | 0.991 | 0.991 | 0.990 | 0.989 |
| 7 | 0.990 | 0.989 | 0.988 | 0.988 | 0.987 | 0.985 |
| 8 | 0.987 | 0.986 | 0.985 | 0.984 | 0.983 | 0.980 |
| 9 | 0.983 | 0.982 | 0.981 | 0.980 | 0.978 | 0.975 |
| 10 | 0.979 | 0.978 | 0.977 | 0.975 | 0.973 | 0.969 |
| 11 | 0.975 | 0.973 | 0.972 | 0.970 | 0.968 | 0.963 |
| 12 | 0.970 | 0.968 | 0.966 | 0.964 | 0.962 | 0.955 |
| 13 | 0.965 | 0.963 | 0.961 | 0.958 | 0.955 | 0.949 |
| 14 | 0.959 | 0.957 | 0.955 | 0.952 | 0.948 | 0.941 |
| 15 | 0.953 | 0.951 | 0.948 | 0.945 | 0.941 | 0.932 |
| 16 | 0.947 | 0.944 | 0.941 | 0.937 | 0.933 | 0.924 |
| 17 | 0.941 | 0.937 | 0.934 | 0.930 | 0.925 | 0.914 |
| 18 | 0.934 | 0.930 | 0.926 | 0.921 | 0.916 | 0.904 |
| 19 | 0.926 | 0.922 | 0.918 | 0.913 | 0.907 | 0.894 |
| 20 | 0.919 | 0.914 | 0.909 | 0.904 | 0.898 | 0.883 |
| 22 | 0.902 | 0.897 | 0.891 | 0.885 | 0.877 | 0.861 |
| 24 | 0.885 | 0.879 | 0.872 | 0.865 | 0.856 | 0.837 |
| 26 | 0.866 | 0.859 | 0.852 | 0.843 | 0.833 | 0.811 |
| 28 | 0.846 | 0.838 | 0.830 | 0.820 | 0.809 | 0.795 |
| 30 | 0.825 | 0.816 | 0.807 | 0.797 | 0.784 | 0.758 |
| 32 | 0.803 | 0.794 | 0.784 | 0.772 | 0.759 | 0.729 |
| 34 | 0.780 | 0.770 | 0.759 | 0.747 | 0.732 | 0.701 |
| 36 | 0.756 | 0.746 | 0.734 | 0.721 | 0.705 | 0.671 |
| 38 | 0.732 | 0.720 | 0.708 | 0.694 | 0.677 | 0.642 |
| 40 | 0.706 | 0.695 | 0.681 | 0.667 | 0.649 | 0.612 |
| 42 | 0.681 | 0.668 | 0.654 | 0.639 | 0.621 | 0.582 |
| 44 | 0.654 | 0.641 | 0.627 | 0.611 | 0.593 | 0.552 |
| 46 | 0.628 | 0.614 | 0.600 | 0.583 | 0.564 | 0.523 |
| 48 | 0.600 | 0.587 | 0.572 | 0.555 | 0.536 | 0.494 |
| 50 | 0.573 | 0.559 | 0.544 | 0.527 | 0.507 | 0.465 |
| 52 | 0.545 | 0.531 | 0.515 | 0.498 | 0.479 | 0.436 |
| 54 | 0.517 | 0.503 | 0.487 | 0.470 | 0.451 | 0.408 |
| 56 | 0.488 | 0.474 | 0.459 | 0.442 | 0.423 | 0.381 |
| 58 | 0.460 | 0.446 | 0.431 | 0.414 | 0.395 | 0.354 |
| 60 | 0.431 | 0.418 | 0.403 | 0.387 | 0.368 | 0.328 |

MOD

TABLE 2.II (continued)

| Elevation angle (degrees) | ~~f(θ)~~ Electrical tower height | | | | | |
|---|---|---|---|---|---|---|
| | 0.40 λ | 0.45 λ | 0.50 λ | 0.528λ | 0.55 λ | 0.625λ |
| 0 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 | 1.000 |
| 1 | 1.000 | 1.000 | 0.999 | 0.999 | 0.999 | 0.999 |
| 2 | 0.998 | 0.998 | 0.998 | 0.997 | 0.997 | 0.995 |
| 3 | 0.997 | 0.996 | 0.995 | 0.994 | 0.993 | 0.989 |
| 4 | 0.994 | 0.992 | 0.990 | 0.989 | 0.988 | 0.981 |
| 5 | 0.991 | 0.988 | 0.985 | 0.983 | 0.981 | 0.970 |
| 6 | 0.986 | 0.983 | 0.979 | 0.975 | 0.972 | 0.957 |
| 7 | 0.982 | 0.977 | 0.971 | 0.967 | 0.962 | 0.941 |
| 8 | 0.976 | 0.970 | 0.962 | 0.957 | 0.951 | 0.924 |
| 9 | 0.970 | 0.963 | 0.953 | 0.945 | 0.938 | 0.904 |
| 10 | 0.963 | 0.954 | 0.942 | 0.933 | 0.924 | 0.882 |
| 11 | 0.955 | 0.945 | 0.930 | 0.919 | 0.909 | 0.859 |
| 12 | 0.947 | 0.934 | 0.917 | 0.905 | 0.893 | 0.834 |
| 13 | 0.938 | 0.923 | 0.903 | 0.889 | 0.875 | 0.807 |
| 14 | 0.929 | 0.912 | 0.889 | 0.872 | 0.857 | 0.773 |
| 15 | 0.918 | 0.899 | 0.873 | 0.855 | 0.837 | 0.748 |
| 16 | 0.908 | 0.886 | 0.857 | 0.836 | 0.815 | 0.717 |
| 17 | 0.897 | 0.873 | 0.840 | 0.817 | 0.795 | 0.684 |
| 18 | 0.885 | 0.859 | 0.823 | 0.797 | 0.772 | 0.651 |
| 19 | 0.873 | 0.844 | 0.804 | 0.776 | 0.749 | 0.617 |
| 20 | 0.860 | 0.828 | 0.785 | 0.755 | 0.726 | 0.582 |
| 22 | 0.833 | 0.796 | 0.746 | 0.710 | 0.677 | 0.510 |
| 24 | 0.805 | 0.763 | 0.705 | 0.665 | 0.625 | 0.436 |
| 26 | 0.776 | 0.728 | 0.663 | 0.618 | 0.574 | 0.363 |
| 28 | 0.745 | 0.692 | 0.621 | 0.570 | 0.522 | 0.290 |
| 30 | 0.714 | 0.655 | 0.577 | 0.522 | 0.470 | 0.219 |
| 32 | 0.682 | 0.619 | 0.534 | 0.475 | 0.419 | 0.151 |
| 34 | 0.649 | 0.582 | 0.492 | 0.428 | 0.368 | 0.085 |
| 36 | 0.617 | 0.545 | 0.450 | 0.383 | 0.321 | 0.025 |
| 38 | 0.584 | 0.509 | 0.409 | 0.340 | 0.275 | -0.031 |
| 40 | 0.552 | 0.473 | 0.370 | 0.298 | 0.231 | -0.083 |
| 42 | 0.519 | 0.438 | 0.332 | 0.258 | 0.190 | -0.129 |
| 44 | 0.488 | 0.405 | 0.296 | 0.211 | 0.152 | -0.170 |
| 46 | 0.457 | 0.372 | 0.262 | 0.187 | 0.117 | -0.205 |
| 48 | 0.427 | 0.341 | 0.230 | 0.155 | 0.085 | -0.235 |
| 50 | 0.397 | 0.311 | 0.201 | 0.126 | 0.056 | -0.259 |
| 52 | 0.369 | 0.283 | 0.174 | 0.099 | 0.031 | -0.278 |
| 54 | 0.341 | 0.257 | 0.149 | 0.076 | 0.009 | -0.291 |
| 56 | 0.315 | 0.232 | 0.126 | 0.055 | -0.010 | -0.300 |
| 58 | 0.289 | 0.208 | 0.105 | 0.037 | -0.026 | -0.304 |
| 60 | 0.265 | 0.186 | 0.087 | 0.021 | -0.039 | -0.304 |

MOD

TABLE 2.II (end)

| Elevation angle (degrees) | ~~f(θ)~~ Electrical tower height | | | | | |
|---|---|---|---|---|---|---|
| | 0.40 λ | 0.45 λ | 0.50 λ | 0.528 λ | 0.55 λ | 0.625 λ |
| 62 | | | | 0.003 | -0.049 | -0.300 |
| 64 | | | | -0.003 | -0.056 | -0.292 |
| 66 | | | | -0.011 | -0.062 | -0.281 |
| 68 | | | | -0.017 | -0.064 | -0.267 |
| 70 | | | | -0.022 | -0.065 | -0.250 |
| 72 | | | | -0.025 | -0.064 | -0.231 |
| 74 | | | | -0.026 | -0.061 | -0.210 |
| 76 | | | | -0.026 | -0.056 | -0.138 |
| 78 | | | | -0.024 | -0.051 | -0.163 |
| 80 | | | | -0.022 | -0.044 | -0.138 |

Note - When the negative sign (-) appears in the Table, it signifies only the existence of a secondary lobe having the opposite phase from the main lobe in the vertical radiation pattern. In order to perform the calculation, ignore the negative (-) and use only the absolute value f(θ) from the Table.

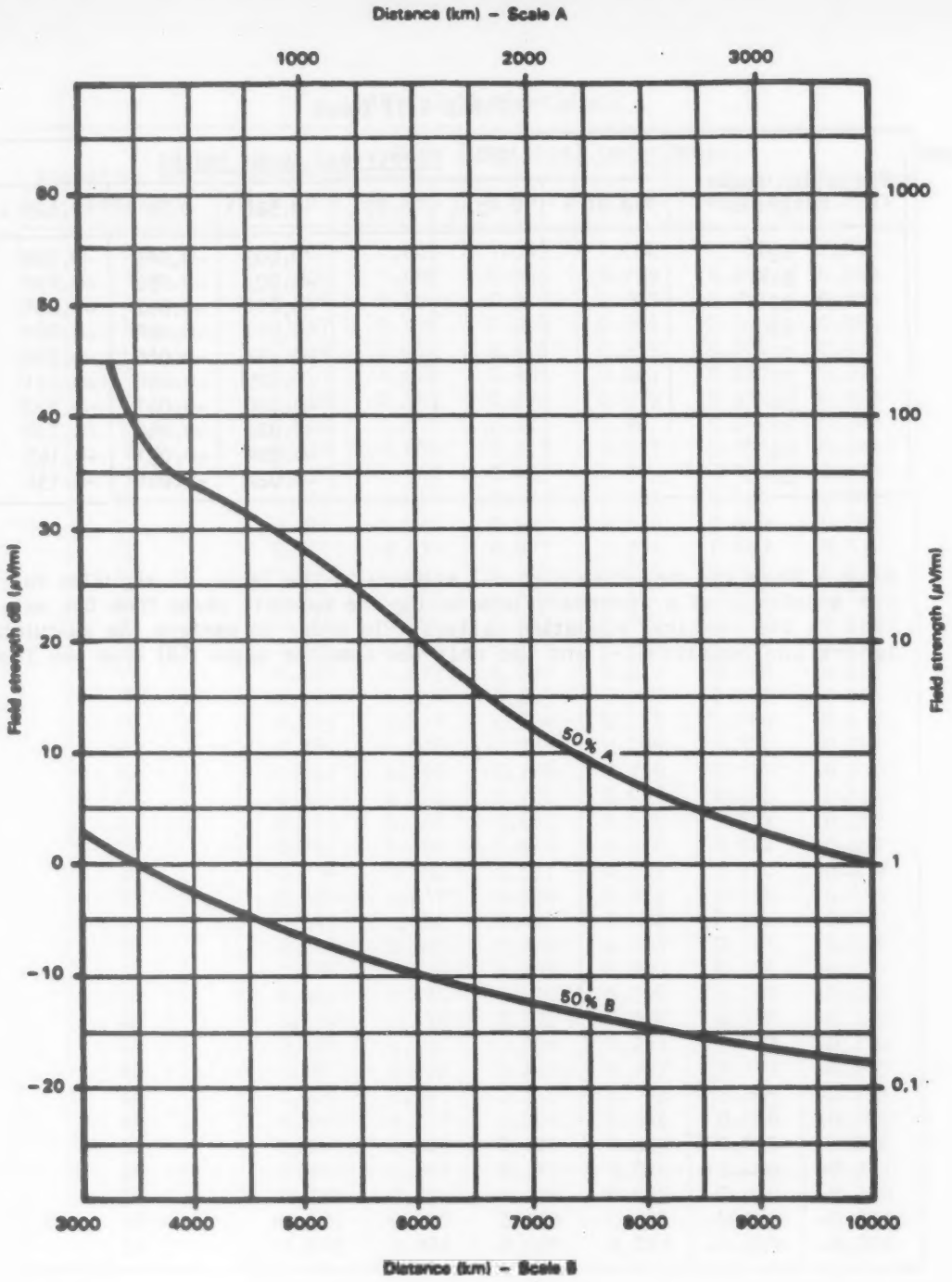



FIGURE 2.6 - Skywave field strength vs distance for a characteristic field strength of 100 mV/m

TABLE 2.III - Skywave field strength vs distance (0 to 10000 km) for a characteristic field strength of 100 mV/m

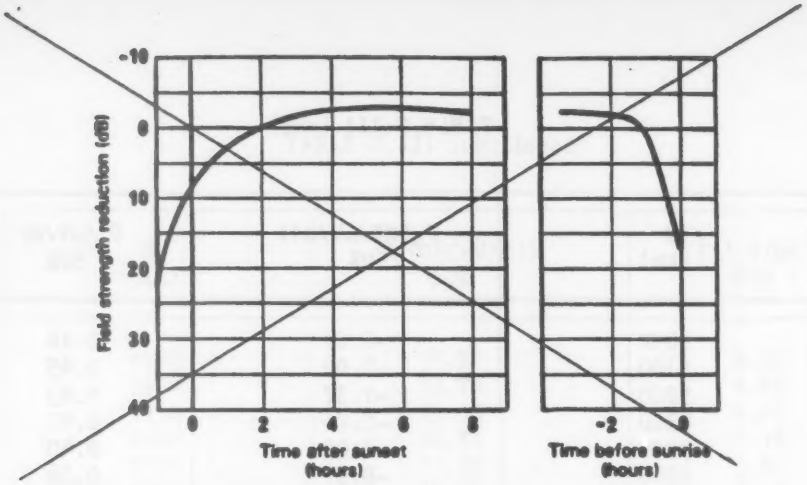
| d (km) | $F_c$(dB(μV/m)) 50% | $F_c$(μV/m) 50% |
|---|---|---|
| 0-200 | 39.28 | 92.06 |
| 250 | 37.79 | 77.54 |
| 300 | 36.75 | 68.82 |
| 350 | 35.86 | 62.06 |
| 400 | 35.13 | 57.08 |
| 450 | 34.46 | 52.86 |
| 500 | 33.92 | 49.65 |
| 550 | 33.40 | 46.78 |
| 600 | 32.94 | 44.36 |
| 650 | 32.45 | 41.95 |
| 700 | 31.94 | 39.54 |
| 750 | 31.32 | 36.81 |
| 800 | 30.73 | 34.40 |
| 850 | 30.18 | 32.30 |
| 900 | 29.51 | 29.89 |
| 950 | 28.83 | 27.63 |
| 1000 | 28.14 | 25.54 |
| 1050 | 27.44 | 23.56 |
| 1100 | 26.79 | 21.84 |
| 1150 | 25.98 | 19.91 |
| 1200 | 25.25 | 18.30 |
| 1250 | 24.50 | 16.78 |
| 1300 | 23.71 | 15.32 |
| 1350 | 22.90 | 13.97 |
| 1400 | 22.08 | 12.71 |
| 1450 | 21.25 | 11.55 |
| 1500 | 20.42 | 10.50 |
| 1550 | 19.59 | 9.53 |
| 1600 | 18.66 | 8.57 |
| 1650 | 17.75 | 7.72 |
| 1700 | 16.87 | 6.98 |
| 1750 | 16.04 | 6.34 |
| 1800 | 15.28 | 5.80 |

TABLE 2.III (continued)

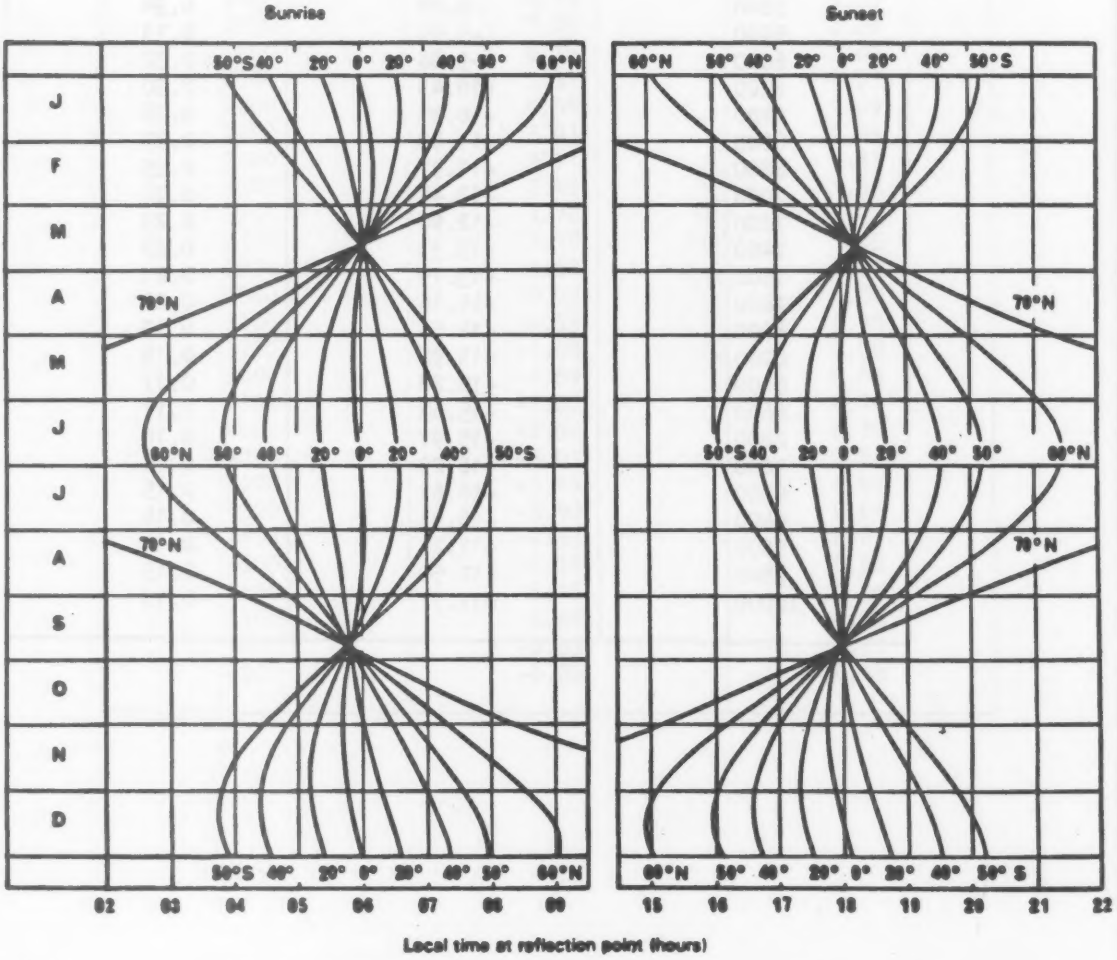
| d (km) | $F_c$(dB(μV/m)) 50% | $F_c$(μV/m) 50% |
|---|---|---|
| 1850 | 14.52 | 5.32 |
| 1900 | 13.78 | 4.89 |
| 1950 | 13.05 | 4.49 |
| 2000 | 12.34 | 4.14 |
| 2100 | 11.15 | 3.61 |
| 2200 | 10.05 | 3.18 |
| 2300 | 8.92 | 2.79 |
| 2400 | 8.13 | 2.55 |
| 2500 | 7.09 | 2.26 |
| 2600 | 6.16 | 2.03 |
| 2700 | 5.32 | 1.85 |
| 2800 | 4.58 | 1.69 |
| 2900 | 3.81 | 1.55 |
| 3000 | 3.11 | 1.43 |
| 3100 | 2.45 | 1.33 |
| 3200 | 1.78 | 1.23 |
| 3300 | 1.18 | 1.15 |
| 3400 | 0.57 | 1.07 |
| 3500 | 0.02 | 1.00 |
| 3600 | -0.53 | 0.94 |
| 3700 | -1.08 | 0.88 |
| 3800 | -1.59 | 0.83 |
| 3900 | -2.08 | 0.79 |
| 4000 | -2.52 | 0.75 |
| 4100 | -3.01 | 0.71 |
| 4200 | -3.46 | 0.67 |
| 4300 | -3.90 | 0.64 |
| 4400 | -4.33 | 0.61 |
| 4500 | -4.74 | 0.58 |
| 4600 | -5.15 | 0.55 |
| 4700 | -5.54 | 0.53 |
| 4800 | -5.93 | 0.51 |
| 4900 | -6.30 | 0.48 |

TABLE 2.III (end)

| d (km) | $F_c$(dB(μV/m)) 50% | $F_c$(μV/m) 50% |
|---|---|---|
| 5000 | -6.67 | 0.46 |
| 5100 | -7.02 | 0.45 |
| 5200 | -7.37 | 0.43 |
| 5300 | -7.71 | 0.41 |
| 5400 | -8.04 | 0.40 |
| 5500 | -8.37 | 0.38 |
| 5600 | -8.68 | 0.37 |
| 5700 | -8.99 | 0.36 |
| 5800 | -9.29 | 0.34 |
| 5900 | -9.59 | 0.33 |
| 6000 | -9.88 | 0.32 |
| 6200 | -10.43 | 0.30 |
| 6400 | -10.97 | 0.28 |
| 6600 | -11.48 | 0.27 |
| 6800 | -11.97 | 0.25 |
| 7000 | -12.44 | 0.24 |
| 7200 | -12.90 | 0.23 |
| 7400 | -13.33 | 0.22 |
| 7600 | -13.75 | 0.21 |
| 7800 | -14.15 | 0.20 |
| 8000 | -14.54 | 0.19 |
| 8200 | -14.92 | 0.18 |
| 8400 | -15.28 | 0.17 |
| 8600 | -15.63 | 0.17 |
| 8800 | -15.97 | 0.16 |
| 9000 | -16.29 | 0.15 |
| 9200 | -16.61 | 0.15 |
| 9400 | -16.91 | 0.14 |
| 9600 | -17.21 | 0.14 |
| 9800 | -17.50 | 0.13 |
| 10000 | -17.77 | 0.13 |




SUP FIGURE-2.7---Field-strength-variation-during-the-night




MOD FIGURE 2.8 2.7 - Times of sunrise and sunset for various months and geographical latitudes

MOD CHAPTER 3 - BROADCASTING STANDARDS* AND TRANSMISSION CHARACTERISTICS

MOD 3.1 Channel spacing

The Plan ~~shall be~~ is based on a channel spacing of 10 kHz and carrier frequencies which are integral multiples of 10 kHz, beginning at 1 610 kHz.

MOD 3.2 Class of emission

The Plan ~~shall be~~ is based on double-sideband amplitude modulation with full carrier A3E.

Classes of emission other than A3E ~~could~~ may also be used on condition that the energy level outside the necessary bandwidth does not exceed that normally expected in A3E emission, for instance to accommodate stereophonic systems.

MOD 3.3 Bandwidth of emission

The Plan ~~shall be~~ is based on a necessary bandwidth of 10 kHz for which only 5 kHz audio bandwidth can be obtained. While this might be an appropriate value within some administrations, others may wish to employ wider bandwidth systems with necessary bandwidths of the order of 20 kHz. However, the protection ratios selected allow operation with 20 kHz occupied bandwidth without an appreciable increase in interference. Stations operating on the frequency 1 700 kHz shall take into account No. 343 of the Radio Regulations.

MOD 3.4 Frequency tolerance

~~As indicated in~~ In accordance with Appendix 7 to the Radio Regulations, the frequency tolerance shall be 20 parts in $10^6$ (0.002%). ~~for powers of 10 kW or less, and 10 Hz for powers greater than 10 kW.~~

SUP 3.5 ~~NOT ALLOCATED~~

SUP ~~* Note --- The effect of receiver characteristics upon AM broadcasting standards~~

~~It is expected that receiver characteristics for this band will be similar to those of existing receivers in the 535 --- 1 605 kHz band. Therefore, they should not affect broadcasting standards.~~

MOD 3.6 3.5 Nominal usable field strength ($E_{nom}$)

Table of nominal usable field strength

| | Noise zone 1 | Noise zone 2 |
|---|---|---|
| Daytime | 0.5 mV/m | 1.25 mV/m |
| Night-time | 3.3 mV/m | 6 mV/m |

MOD 3.7 3.6 Definition of noise zones

Noise zone 1

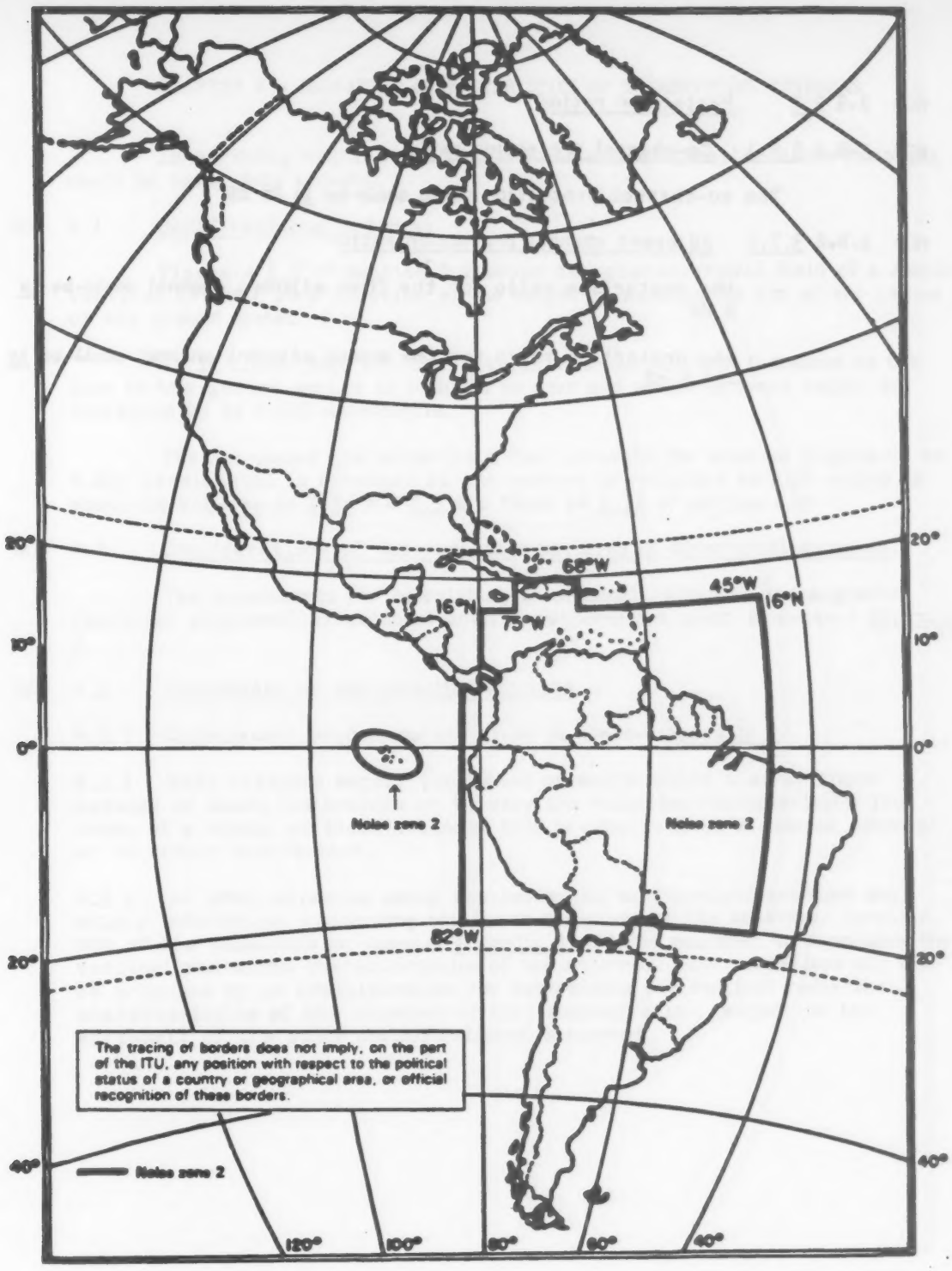
Comprises the whole of Region 2 with the exception of noise zone 2.

Noise zone 2

Comprises the area within the line defined by the coordinates 20° S-45° W, the meridian 45° W to the coordinates 16° N-45° W, the parallel 16° N to the coordinates 16° N-68° W, the meridian 68° W to the coordinates 20° N-68° W, the parallel 20° N to the coordinates 20° N-75° W, the meridian 75° W to the coordinates 16° N-75° W, the parallel 16° N to the coordinates 16° N-80° W, the meridian 80° W to the northeast coast of Panama, the frontier between Panama and Colombia, the southeast coast of Panama and the meridian 82° W to the parallel 20° S, and the parallel 20° S, with the exception of Chile and Paraguay, until the frontier between Paraguay and Brazil until 45° W. Bolivia is entirely included in noise zone 2 as are the archipelago of San Andres y Providencia and the islands belonging to Colombia and the Colon archpelago or the Galapagos Islands (Ecuador).

Note - See the maps of noise zones on the following page.

## NOISE ZONES


20°
10°
0°
20°
40°
68°W
45°W
16°N
16°N
75°W
5°
Noise zone 2
Noise zone 2
82°W
The tracing of borders does not imply, on the part of the ITU, any position with respect to the political status of a country or geographical area, or official recognition of these borders.
Noise zone 2
120°
100°
80°
60°
40°

MOD ~~3.8~~ 3.7 Protection ratios

MOD ~~3.8.1~~ 3.7.1 Co-channel protection ratio

The co-channel protection ratio ~~shall be~~ is 26 dB.

MOD ~~3.8.2~~ 3.7.2 Adjacent channel protection ratio

- the protection ratio for the first adjacent channel ~~shall be~~ is 0 dB
- the protection ratio for the second adjacent channel ~~shall be~~ is -29.5 dB.

## CHAPTER 4 - RADIATION CHARACTERISTICS OF TRANSMITTING ANTENNAS

In carrying out the calculations indicated in Chapter 2 the following shall be taken into account.

MOD 4.1 Omnidirectional antennas

Figure-4 2.3 of section 2.2 shows the characteristic field of a simple vertical antenna as a function of its height in wavelengths and of the radius of the ground system.

It is clear that the characteristic field strength increases as the loss in the ground system is reduced to zero and as the antenna height is increased up to 0.625 wavelengths.

The increased characteristic field strength for antenna heights up to 0.625 wavelengths is obtained at the expense of radiation at high angles as shown in Figures 4a 2.3b and 2.5 and Table II 2.II of section 2.2.

MOD 4.2 Considerations of the radiation patterns of directional antennas

The procedures for calculating theoretical, expanded and augmented (modified expanded) directional antenna patterns are given in Annex-4 Appendix 2.

MOD 4.3 Top-loaded or sectionalized antennas

4.3.1 Calculation procedures are given in Annex-2 Appendix 3.

4.3.2 Many stations employ top-loaded or sectionalized towers, either because of space limitations or to vary the radiation characteristics from those of a simple vertical antenna. This is done to achieve desired coverage or to reduce interference.

4.3.3 An administration using top-loaded or sectionalized antennas shall supply information concerning the tower structure of the antennas. Normally, one of the equations in Annex-2 Appendix 3 shall be employed to determine the vertical radiation characteristics of the antennas. Other equations may also be proposed by an administration for determining the vertical radiation characteristics of the antennas of that administration, subject to the agreement of the other administration(s) concerned.

[CHAPTER 5 - TECHNICAL CRITERIA FOR INTERSERVICE SHARING]

[New text to be developed and submitted separately]

## APPENDIX 1

## (To Annex 1)

### Atlas of ground conductivity *

The tracing of borders does not imply on the part of the ITU any position with respect to the status of a country or geographical area, or official recognition of these borders.

* Published separately.

ANNEX-4

APPENDIX 2

(To Annex 1)

# Calculation of directional antenna patterns

ANNEX-4

APPENDIX 2

(to Annex 1)

**Calculation of directional antenna patterns**

Introduction

This annex describes methods to be employed in calculating the field strength produced by a directional antenna at a given point.

1. General equations

The theoretical directional antenna radiation pattern is calculated by means of the following equation, which sums the field strength from each element (tower) in the array.

$$E_T(\phi,\theta) = \left| K_L \sum_{i=1}^{n} F_i f_i(\theta) \angle \psi_i + S_i \cos\theta \cos(\phi_i - \phi) \right| \quad (1)$$

where:

$$f_i(\theta) = \frac{\cos(G_i \sin\theta) - \cos G_i}{(1 - \cos G_i)\cos\theta} \quad (2)$$

where:

$E_T(\phi,\theta)$: theoretical inverse distance field strength at one kilometer in mV/m for the given azimuth and elevation;

$K_L$: multiplying constant in mV/m which determines the pattern size (see paragraph 2.5 below for derivation of $K_L$);

n: number of elements in the directional array;

i: denotes the ith element in the array;

$F_i$: ratio of the theoretical field strength due to the ith element in the array relative to the theoretical field strength due to the reference element;

$\theta$: vertical elevation angle, in degrees, measured from the horizontal plane;

$f_i(\theta)$: ratio of vertical to horizontal plane field strength radiated by the ith element at elevation angle $\theta$;

$G_i$: electrical height of the ith element, in degrees;

$S_i$: electrical spacing of the ith element from the reference point in degrees;

$\theta_i$: orientation of the ith element from the reference element (with respect to True North), in degrees;

$\theta$: azimuth with respect to True North, in degrees;

$\psi_i$: electrical phase angle of field strength due to the ith element (with respect to the reference element), in degrees.

Equations (1) and (2) assume that;

- the current distribution in the elements is sinusoidal,
- there are no losses in the elements or in the ground,
- the antenna elements are base-fed, and
- the distance to the computation point is large in relation to the size of the array.

2. Determination of values and constants

2.1 Determination of the multiplying constant K for an array

The multiplying constant K for the loss-free case may be computed by integrating the power flow over the hemisphere, deriving an r.m.s. field strength and comparing the result with the case where the power is radiated uniformly in all directions over the hemisphere.

Thus:

$$K = \frac{E_s \sqrt{P}}{e_h} \quad \text{mV/m}$$

where:

K: no-loss multiplying constant (mV/m at 1 km);

$E_s$: reference level for uniform radiation over a hemisphere, equal to 244.95 mV/m at 1 km for 1 kW;

P: antenna input power (kW);

$e_h$: root mean square radiation pattern over the hemisphere which may be obtained by integrating e(θ) at each elevation angle over the hemisphere. The integration can be made using the trapeziodal method of approximation, as follows:

$$e_h = \left[\frac{\pi\Delta}{180}\left\{\tfrac{1}{2}[e(\theta)]^2 + \sum_{m=1}^{N}[e(m\Delta)]^2\cos m\Delta\right\}\right]^{\frac{1}{2}} \qquad (3)$$

where:

$\Delta$: interval, in degrees, between equally-spaced sampling points at different elevation angles θ;

m: an integer from 1 to N, which gives the elevation angle θ in degrees when multiplied by $\Delta$, i.e. $\theta = m\Delta$;

N: one less than the number of intervals $N = \frac{90}{\Delta} - 1$;

e(θ): root mean square radiation pattern given by equation (1) with K equal to 1 at the specified elevation angle θ (the value of θ is 0 in the first term of equation (3) and mΔ in the second term); e(θ) is computed using equation (4).

$$e(\theta) = \left[\sum_{i=1}^{n}\sum_{j=1}^{n} F_i f_i(\theta) F_j f_j(\theta)\cos\psi_{ij} J_0(S_{ij}\cos\theta)\right]^{\frac{1}{2}} \qquad (4)$$

where:

i: denotes the ith element;

j: denotes the jth element;

n: number of elements in the arry;

$\psi_{ij}$: difference in phase angles of the field strengths from the ith and jth elements in the array;

$S_{ij}$: angular spacing between the ith and jth elements in the array;

$J_0(S_{ij}\cos\theta)$: the Bessel function of the first kind and zero order of the apparent spacing between the ith and jth elements. In equation (4), $S_{ij}$ is in radians. However when special tables of Bessel functions giving the argument in degrees are used, the values of $S_{ij}$ should then be in degrees.

## 2.2 Relationship between field strength and antenna current

The field strength resulting from a current flowing in a vertical antenna element is:

$$E = \frac{R_c I[\cos(G\sin\theta) - \cos G]}{2\pi r\cos\theta} \times 10^3 \quad \text{mV/m} \qquad (5)$$

where:

E: field strength in mV/m;

$R_c$: resistivity of free space ($R_c = 120\pi$ ohms);

I: current at the current maximum, in amperes[1];

G: electrical height of the element, in degrees;

r: distance from the antenna, in metres;

$\theta$: vertical elevation angle, in degrees.

At one kilometre and in the horizontal plane ($\theta = 0°$);

$$E = \frac{120\pi\ I(1 - \cos G) \times 10^3}{2\ (1000)} \quad \text{mV/m} \qquad (6)$$

hence:

$$E = 60I(1-\cos G) \quad \text{mV/m} \qquad (7)$$

---

1 I is the current at the maximum of the sinusoidal distribution. If the electrical height of the element is less than 90°, the base current will be less than I.

2.3 Determination of no-loss current at current maximum

For a tower of uniform cross-section or for a similar type of directional array element, the no-loss current at the current maximum is:

$$I_i = \frac{KF_i}{60(1-\cos G_i)} \qquad (8)$$

where:

$I_i$: current at current maximum in amperes in the ith element;

K: no-loss multiplying constant computed as shown in paragraph 2.1 above.

The base current is given by $I_i \sin G_i$.

2.4 Array power loss

Power losses in a directional antenna system are of various types, including ground losses, antenna coupling losses, etc. The loss resistance for the array may be assumed to be inserted at the current maximum to allow for all losses. The power loss is:

$$P_L = \frac{1}{1000} \sum_{i=1}^{n} R_i I_i^2 \qquad (9)$$

where:

$P_L$: total power loss, in kW;

$R_i$: assumed loss resistance, in ohms (one ohm, unless otherwise indicated) for the ith tower[1];

$I_i$: current at current maximum (or base current if the element is less than 90 degrees in electrical height) for the ith tower.

---

1 The loss resistance shall in no way exceed a value such that the value of $K_L$ (see paragraph 2.5) differs by more than ten percent from that calculated for a resistance of one ohm.

2.5 Determination of a corrected multiplying constant

To allow for power loss in the antenna system, the multiplying constant K can be modified, as follows:

$$K_L = K \left( \frac{P}{P + P_L} \right)^{\frac{1}{2}} \qquad (10)$$

where:

$K_L$: multiplying constant after corrrection for the assumed loss resistance;

K: no-loss multiplying constant computed in paragraph 2.1 above;

P: array input power (kW);

$P_L$: total power loss (kW).

2.6 r.m.s. value of radiation to be notified for directional antennas

The radiation $E_r$ for directional antennas is determined as follows:

$$E_r = K_L e(\theta) \qquad \text{mV/m at 1 km}$$

2.7 Determination of expanded pattern values

The expanded pattern is determined as follows:

$$E_{EXP}(\phi,\theta) = 1.05 \left\{ [E_T(\phi,\theta)]^2 + Q^2 \right\}^{\frac{1}{2}} \qquad (11)$$

where:

$E_{EXP}(\phi,\theta)$: expanded pattern radiation at a particular azimuth, $\phi$, and a particular elevation angle $\theta$;

$E_T(\phi,\theta)$: theoretical pattern radiation at a particular azimuth, $\phi$, and a particular elevation angle $\theta$;

Q: quadrature factor, computed as:

$$Q = Q_{OB}(\theta)$$

where:

$Q_0$ is the Q on the horizontal plane, and is normally the greatest of the following three quantities:

$$10.0 \quad ; \quad 10\sqrt{P} \quad \text{or} \quad 0.025K_L\left[\sum_{i=1}^{n} F_i^2\right]^{\frac{1}{2}}$$

$g(\theta)$ is computed as follows:

If the electrical height of the shortest tower is less than or equal to 180 degrees, then:

$$g(\theta) = f(\theta) \text{ for the shortest tower.}$$

If the electrical height of the shortest tower is greater than 180 degrees, then:

$$g(\theta) = \frac{\{[f(\theta)]^2 + 0.0625\}^{\frac{1}{2}}}{1.030776}$$

where $f(\theta)$ for the shortest tower is used.

Note: In comparing the electrical heights of the antenna towers to determine the shortest tower, the total apparent height (as determined by current distribution) is used for top-loaded and sectionalized towers.

2.8 Determination of augmented (modified expanded) pattern values

The purpose of the augmented (modified expanded) pattern is to put one or more "patches" on an expanded pattern. Each "patch" is referred to as an "augmentation". The augmentation may be positive (resulting in more radiation than that of the expanded pattern) or negative (resulting in less radiation than that of the expanded pattern). In no case shall the augmentation be so negative that the augmented (modified expanded) pattern radiation is below the theoretical radiation pattern.

Spans of augmentation may overlap. That is, an augmentation may itself be augmented by a subsequent augmentation. To ensure that the calculations are properly made, the augmentations are handled in increasing order of central azimuth of augmentation, starting at True North. If several augmentations have the same central azimuth, then they are considered in order of decreasing span (i.e. the one with the largest span is handled first). If more that one augmentation has the same central azimuth and the same span, then they are considered in ascending order of their effect.

$$E_{MOD}(\phi,\theta) = \left\{[E_{EXP}(\phi,\theta)]^2 + g^2(\theta)\sum_{i=1}^{a} A_i\cos^2(180\Delta_i/\alpha_i)\right\}^{\frac{1}{2}} \qquad (12)$$

where:

$E_{MOD}(\phi,\theta)$: augmented (modified expanded) pattern radiation at a particular azimuth, $\phi$, and a particular elevation angle, $\theta$;

$E_{EXP}(\phi,\theta)$: expanded pattern radiation at a particular azimuth, $\phi$. and a particular elevation angle, $\theta$;

$g(\theta)$: same parameter as described for the expanded pattern (see paragraph 2.7);

a: number of augmentations;

$\Delta_i$: difference between the azimuth at which the radiation is desired $\phi$, and the central azimuth of augmentation of the ith augmentation. It will be noted that $\Delta_i$ must be less than or equal to one-half of $\alpha_i$;

$\alpha_i$: total span of the ith augmentation;

$A_i$: is the value of the augmentation given by the expression[1]:

$$A_i = [E_{MOD}(\phi_i,\theta)]^2 - [E_{INT}(\phi_i,\theta)]^2 \qquad (13)$$

where:

$\phi_i$: central azimuth of the ith augmentation;

$E_{MOD}(\phi_i,\theta)$: augmented (modified expanded) horizontal plane radiation at the central azimuth of the ith augmentation, after applying the ith augmentation, but before applying subsequent augmentations;

$E_{INT}(\phi_i,\theta)$: an interim value of radiation in the horizontal plane at the central azimuth of the ith augmentation. The interim value is the radiation obtained from applying previous augmentations (if any) to the expanded pattern, but before applying the ith augmentation.

---

1 When $A_i$ is negative, there is negative augmentation; when $A_i$ is positive, there is positive augmentation. $A_i$ must not be so negative that $E_{MOD}(\phi,\theta)$ falls below $E_T(\phi,\theta)$ of any azimuth, $\phi$, or elevation angle, $\theta$.

ANNEX-2

APPENDIX 3

(to Annex 1)

**Equations for the calculation of the normalized vertical radiation from top-loaded and typical sectionalized antennas**

ANNEX-2

APPENDIX 3

(to Annex 1)

**Equations for the calculation of the normalized vertical radiation from top-loaded and typical sectionalized antennas**

Basically, the equation is:

$$f(\theta) = \frac{E_\theta}{E_0}$$

where:

$E_\theta$: radiation at a desired elevation angle, $\theta$;

$E_0$: radiation in the horizontal plane.

Specific equations for top-loaded and typical sectionalized antennas are given below.

These equations use one of more of four variables A, B, C and D, which are defined after each equation.

1. Top-loaded antenna (Type 1 antennas)

$$f(\theta) = \frac{\cos B\cos(A\sin\theta) - \sin\theta\sin B\sin(A\sin\theta) - \cos(A+B)}{\cos\theta[\cos B - \cos(A+B)]}$$

where:

A: electrical height of the antenna tower;

B: difference between the apparent electrical height (based on current distribution) and the actual height (A);

$\theta$: the elevation angle with respect to the horizontal plane.

Note: When B is zero (i.e., when there is no top-loading), the equation reduces to that of a simple vertical antenna.

2. Sectionalized tower (Type 2 antennas)

$$f(\theta) = \frac{[\cos B\cos(A\sin\theta) - \cos(A+B)]\sin(C+D-A) + \sin B[\cos D\cos(C\sin\theta) - \sin\theta\sin D\sin(C\sin\theta) - \cos(C+D-A)\cos(A\sin\theta)]}{\cos\theta([\cos B - \cos(A+B)]\sin(C+D-A) + \sin B[\cos D - \cos(C+D-A)])}$$

where:

A: actual height of the lower section;

B: difference between the apparent electrical height (based on current distribution) of the lower section and the actual height of the lower section (A);

C: actual total height of the antenna;

D: difference between the apparent electrical height (based on current distribution) of the total tower and the actual height of the total tower (C);

θ: vertical angle with respect to the horizontal plane.

3. Administrations proposing to use other types of antenna should furnish details of their characteristics together with a radiation pattern.

[ANNEX 2]

[to the Regional Agreement]
[to establish a Plan for the]
[Broadcasting Service in the Band 1 605 - 1 705 kHz]
[in Region 2]

[PLANNING CRITERIA]

1. Assignment principles

1.1 An administration may make assignments on its allotted channels without regard to other co-channel assignments and allotments, provided that the standard parameters in 2.1 are used.

1.2 Where neighboring countries have allotments on adjacent channels, the procedures to be followed before bringing into use assignments from allotments in border areas are specified in section 4. of this Annex.

1.3 An administration may make assignments on channels not allotted to it in a given area provided that it protects the allotments and assignments of other countries in accordance with 5.2. Such assignments shall not restrict the use of allotments which comply with 2.1 and 3.1 of this Annex.

1.4 Administrations may bring into use assignments with parameters different from the standardized parameters provided the conditions given in 3. of this Annex are met.

2. Planning criteria

2.1 Standardized parameters

The Allotment Plan is based on the following standard parameters for day and night and for noise zones 1 and 2.

- Station power: 1 kW

- Antenna: omnidirectional with 90° degrees electrical height

2.2 Co-channel standardized distance

The standardized distances between allotments in the Plan are:

- for noise zone 1 land path: 330 km, based on skywave protection for the nighttime $E_{nom}$ of 3.3. mV/m;

- for noise zone 2 land path: 120 km, based on groundwave protection for the daytime $E_{nom}$ of 1.25 mV/m, using a uniform conductivity of 6 millisiemens;

- for sea paths and mixed paths in noise zones 1 and 2, [ ]

3. Use of different parameters

3.1 Assignments on allotted channels may use parameters other than the standardized parameters prescribed in 2.1 provided that:

- the groundwave or skywave field strength, whichever is greater, produced during nighttime hours at the boundary of any co-channel allotment area of another administration does not exceed the nominal usable field strength in 3.5 of Annex 1 divided by 20. Moreover, the skywave field strength produced at any point within the allotment area must not exceed the maximum permissible field strength prescribed in Figure 1 of this Annex; and

- the groundwave field strength produced over land paths at the boundary of the any co-channel allotment during daytime hours does not exceed the nominal usable field strength in 3.5 of Annex 1 divided by 20. In the case of mixed or sea paths, the groundwave field strength produced at the boundary of any co-channel allotment area shall not exceed the field strength that would be produced by a reference station with standardized parameters located at any point on the boundary of the allotment area within which proposed station will be located; and

- the groundwave field strength produced at any point within the allotment area of another administration to which a first or second adjacent channel is allotted does not exceed the field strength that would be produced by a reference station with standarized parameters situated at any point on the boundary of the allotment area within which the proposed station will be located.

3.2 Assignments on non-allotted channels may use parameters other than the standardized parameters in 2.1, provided that protection is accorded pursuant to 5.2 and 5.4 of this Annex. Additionally, the field strength produced by the proposed assignment within the area of a neighboring country without a co-channel or adjacent channel allotment shall not exceed the field strength that would be produced by a reference station with standardized parameters located on at any point on the border of the country within which the proposed station will be located.

3.3 In no case may station power exceed 10 kW.

4. Required coordination of assignments on first and second adjacent channels

An administration proposing to bring into use an assignment on an allotted channel in a border area shall coordinate this assignment with another administration if the field strength produced by the proposed assignment within the neighboring adjacent channel allotment area of that other administration exceeds the daytime nominal usable field strength divided by the applicable protection ratio as prescribed in 3.5 and 3.7 of Annex 1, respectively. In no case, however, will such coordination be required if the

proposed assignment is located at a distance from the neighboring adjacent channel allotment area greater than the following:

for first adjacent channels:

- ground path in noise zone 1: 53 km
- mixed or sea path in noise zone 1: [310] km
- ground path in noise zone 2: 35 km
- mixed or sea path in noise zone 2: [160] km

for second adjacent channels:

[to be developed]

5. Protection considerations

5.1 Protection of allotments from assignments on allotted channels

Assignments implementing co-channel allotments are considered to be compatible with each other when they are brought into use in accordance with section 2.

5.2 Protection of allotments from assignments on non-allotted channels

5.2.1 The area of another administration to which a channel is allotted shall be protected by assignments on non-allotted channels. The area to be protected is delimited by:

- the boundary of the allotment area; and
- the contour corresponding to the nominal usable field strength of any assignment on the allotted channel which extends beyond the boundary of the allotment area and is within the country.

5.2.2 In the case of nighttime co-channel interference, the skywave or groundwave field strength, whichever is greater, produced at the boundary of the area defined in 5.2.1 by an assignment on a non-allotted channel shall not exceed the nominal usable field strength prescribed in 3.5 of Annex 1 divided by the co-channel protection ratio prescribed in 3.7 of Annex 1. In all other cases only groundwave interference is considered.

5.2.3 In the case of mixed or sea paths for daytime hours, the groundwave field strength produced at the boundary of the area defined in 5.2.1 shall not exceed the field strength that would be produced by a station with standardized parameters located at the standardized distance. The reference

situation is established by hypothetically locating the reference station at the standardized distance on a line that passes through the proposed transmitter site and each point on the boundary of the protected allotment area being assessed.

5.2.4 In addition to the proscriptions in 5.2.2, the interfering skywave field strength produced at any point within the protected area defined in 5.2.1 shall not exceed the maximum permissible field strength prescribed in Figure 1.

5.2.5 Where the contour corresponding to the nominal usable field strength extends beyond the border of the country in which the station is located, the maximum permissible interfering field strength at the border shall be the field strength of the protected station calculated along the border divided by the protection ratio. For protection purposes, the border of a country should be deemed to encompass only its land area, including islands.

5.2.6 The effect of each interfering transmitter shall be evaluated separately, and interference from other transmitters shall not be taken into account in determining the maximum signal strength permitted from each transmitter.

5.3 Protection of assignments on non-allotted channels from assignments on allotted channels

Assignments on non-allotted channels do not receive protection from assignments on allotted channels.

5.4 Protection of assignments on non-allotted channels from other assignments on non-allotted channels

5.4.1 Assignments on non-allotted channels are protected from subsequent assignments on non-allotted channels. The protected contour encompasses the area in which the groundwave field strength is equal to or greater than the appropriate value of $E_{nom}$ given in 3.5 of Annex 1.

5.4.2 The field strength of skywave interfering signals shall be calculated at the site of an assignment using a non-allotted channel.

5.4.3 The maximum permitted interfering field strength is the value of the nominal usable field strength divided by the appropriate protection ratio.

5.4.4 In the case of nighttime co-channel interference, the interfering signal considered is the greater of the skywave or groundwave signal. In all other cases, only groundwave interference is considered.

5.4.5 The effect of each interfering transmitter shall be evaluated separately, and interference from other transmitters shall not be taken into

account in determining the maximum signal strength permitted from each transmitter.

5.4.6 Where the protected countour extends beyond the border of the country in which the station is located, the maximum permissible interfering groundwave field strength at the border is the field strength of the protected station calculated along the border divided by the protection ratio. For protection purposes, the border of a country should be deemed to encompass only its land area, including islands.

6. Protection of stations of the fixed and mobile services on non-allotted channels

(To be addressed in additional proposals submitted by the United States.)

**FIGURE 1**

**Maximum permitted skywave field strength at any point within an allotment area**

**[To be developed]**

**ANNEX 3**

**to the Regional Agreement**
**to establish a Plan for the**
**Broadcasting Service in the Band 1 605 - 1 705 kHz**
**in Region 2**

# PLAN

# OF ALLOTMENTS

# AND

# ALLOTMENTS CONVERTED TO ASSIGNMENTS

## APPENDIX B

## DESCRIPTION OF THE ALLOTMENT PLANNING METHOD

1. *Introduction*

Because the major portions of the technical criteria were already adopted at the First Session, the bulk of the work at the Second Session will be devoted to the development of a regional plan. During the intersessional period, a considerable amount of work was to be done in preparation for the Second Session. Although some of this has been done; additional work remains to be done with the assistance of experts from various countries in the Region.

Since the First Session of the Conference adopted a plan based on the allotment of channels to areas rather than the assignment of channels to specific locations, planning will be framed in terms of the effect between allotments. Each country will be divided into one or more allotment areas, and one or more frequencies will be assigned for use in each allotment area. Following is a more detailed description of this process, with an indication of how much has already been accomplished, and what remains to be done.

2. *Standardized Separations Between Co - channels* For planning purposes minimum standardized separations have been adopted between co-channel allotment areas. For land paths, these separations are 330 km for Noise Zone 1 (which includes all U.S. territory) and 120 km for Noise Zone 2. For mixed land and sea paths, various separations have been used in studies conducted by the IFRB as part of the intersessional activities. However, for mixed paths, the distances were limited to the sea portion of the path plus no more than 330 km or 120 km of the land path in Noise Zones 1 and 2, respectively.

Using the fixed land path separations and the various mixed path separations, maps have been prepared showing the allotment areas and the minimum number of frequencies available for use in each allotment area. A complete study of Region 2 has been completed using a mixed path separation of 600 km, and a study of the Region (excluding the Eastern Carribean) has been completed using a mixed path separation of 450 km.[1]

When using a mixed path separation of 600 km, at least one frequency is available for use throughout the Region, except in the Eastern Carribean. Following the procedures adopted at the First Session, the IFRB found that it would be necessary to reduce the mixed path separation to 350 km in the Eastern Carribean to provide for at least one frequency per allotment area. However, the IFRB went beyond the techniques described in the Report to the Second Session. The planning method adopted at the First Session was enhanced through the use of a "pairing" concept that allows a frequency to be reused at a closer geographic distance. Consider the following example:

A<---400 km--->B<---350 km--->C

This figure shows three allotment areas (A, B, and C) within a 600 km radius of B, thus permitting the allotment of a minimum of three channels for area B pursuant to the planning method adopted at the First Session. However, it is obvious that areas A and C are separated by more than the co-channel standardized distance (in this example, 600 km), thus allowing the use of the same frequencies in areas A and C. By pairing A and C and requiring them to use the same frequencies, five frequencies become available for use in area B instead of three. This approach can be generalized for any number of linked allotment areas and pairs, and can be extended threefold and beyond if appropriate.

Using the pairing concept in the Eastern Carribean, the IFRB found that a mixed path distance as high as 500 km could provide for at least one frequency per allotment area.[2]

As the Lima CITEL meeting analyzed the IFRB's work, it became apparent that certain additional studies are required in preparation for the Second Session. Specifically, it was deemed necessary to develop maps of allotment areas and related tables for a mixed path of 500 km for all of Region 2; the 500-km study was done only for the Eastern Carribean. Also, it was thought important to develop the maps and tables for a mixed path of 450 km in the Eastern Carribean; the earlier 450-km study did not include the Eastern Carribean. These additional studies are necessary so that the Second Session will have complete studies using 450 km, 500 km, and 600 km to be able to properly balance the tradeoffs of more available frequencies for some allotment areas against increases in interference resulting from shorter distances between allotment areas. Until we receive the results of these studies, and have an opportunity to analyze them, we will be unable to take a position concerning the most desirable mixed path distance(s) to be used for development of the allotment areas.

3. *Adjacent Channel Situations*

The planning techniques adopted at the First Session are based primarily on co-channel considerations. However, at the Second Session it will be necessary to take adjacent channels into account as we allot the frequencies. A rigorous approach to taking adjacent channels into account (analagous to the co-channel situation) has not been found. Indeed, work at the Ecole Polytechnique Federale de Lausanne in Switzerland, in conjunction with the IFRB, has shown that it is not possible to eliminate all first adjacent channel relationships between all geographically adjacent countries. (Because the power has been limited to one kilowatt, the second-adjacent and third-adjacent considerations are so minimal that they can generally be ignored in developing the allotment plan, although they will assume a greater importance in making actual assignments.)

We anticipate that the development of the Plan at the Second Session can avoid the potential for many first adjacent channel incompatibilities between countries by judicious assignment of frequencies. However, in many cases, such as when only two countries share the 10 frequencies, it is simply impossible from an engineering standpoint to provide that all allotments can be implemented while ignoring first adjacent channels in other countries. Thus, in general throughout the Region, it will be necessary that the remaining adjacent channel situations be handled via bilateral and/or multilateral agreements between and/or among the affected countries. In the case of the continental U.S., we anticipate that our excellent bilateral relationships with Canada and Mexico will be extended to cover the adjacent channel situation.

In the event that such agreements do not exist, or in the event of an unsuccessful application of such agreements, then the most appropriate and effective manner of resolving these situations would be a procedure similar to the one incorporated in International Radio Regulations 1506 and 1509, with appropriate modifications to apply to the band 1605-1705 kHz. These regulations provide that when coordination has not been successfully effected, with respect to the probability of harmful interference, on examination of notices of frequency assignments, the IFRB will take into account the frequency assignments for transmission or reception already recorded in the Master Register.

The First Session adopted distances to be used to determine when there would be a first adjacent channel impact between allotment areas. Since these distances correspond to a co-channel mixed path separation of 600 km, it would be necessary to change the adjacent channel distances if a co-channel mixed path distance other than 600 km is adopted at the Second Session.

4. *Additional Preparatory Work*

Participants at the Lima CITEL meeting, noting that the Second Session will last less than three weeks, suggested that other intersessional tasks (in addition to completion of the 450-km and 500-km studies discussed above) be undertaken so as to facilitate the work at the Second Session:

a. Preparation of maps showing stations on 1600, 1590, and 1580 KHz, along with their pertinent contours, for assistance in allotting 1610, 1620 and 1630 KHz.

b. Preparation of lists showing how all of the allotment areas are linked to each other using distances of 450, 500, and 600 km.

c. Development of draft allotment plans, based on mixed path distances of 450, 500, and 600 km. The draft plans would incorporate the pairing concept described above.

A suitable resolution requesting that the additional intersessional tasks be carried out has been adopted by CITEL and sent to the IFRB for consideration. It is understood that the IFRB would not be able to handle these tasks with its own staff, and would need assistance from various countries in carrying them out. The Commission is more than prepared to assist in this effort.

## FOOTNOTES FOR APPENDIX B

[1] The results of these studies by the IFRB were previously placed in the docket of this proceeding.

[2] The results of this study will be placed in the docket of this proceeding.

## APPENDIX C

## SUMMARY OF COMMENTS

1. Comments were filed by three parties: Association for Broadcast Engineering Standards Inc., Offshore Navigation, Inc., and the American Association of State Highway and Transportation Officials.[1]

2. In its comments, the Association for Broadcast Engineering Standards, Inc. (ABES), notes that the allotment method, adopted at the First Session of the Conference, provides the proper foundation for the ultimate station assignments which will be made in the expanded band. It further submits that this approach will give the Commission the greatest degree of flexibility in making station assignments on the basis of actual demands for service, rather than on the basis of a more rigid system of predictive station assignments. ABES believes that the two principal technical issues left unresolved by the 1986 First Session of the Expanded Band Conference were properly referred to the Radio Advisory Committee for further study and elaboration. Commenter commits itself to full participation in the Committee's work to deal with any aspects of these or other technical matters on which its assistance would be helpful.

3. In regard to Travelers Information Stations (TIS), ABES does not take issue with the Commission's tentative conclusion that the present assignment of TIS facilities to 1610 kHz will have to be modified. Although the ultimate placement of TIS is a domestic issue, ABES points out that the Commission's flexibility in this regard will be affected by the provisions in the Final Agreement reached at the Second Session of the Conference. Therefore, commenter asserts that it is important for the United States to support station assignment standards that will be compatible with the establishment and continuation of TIS service on 1700 kHz or elsewhere in the expanded band. Also, it submits, TIS should continue to be considered a broadcast service and agreements on any secondary uses of the additional 100 kHz of spectrum to be allotted to the AM band should recognize the importance of full and adequate protection to broadcast services.

4. Also commenting on the TIS service is the American Association of State Highway and Transportation Officials, Special Committee on Communications (AASHTO Committee). This is a non-profit, non-partisan association representing the highway and transportation departments of the fifty states and the District of Columbia and the Commonwealth of Puerto Rico. This broad based, nationally constituted organization is involved in all aspects of highway and transportation system planning, construction, and operation. The ASSHTO Special Committee on Communications is one of many committees of this organization. It focuses its interest and expertise on the various radio frequency communications needs associated with America's highway systems. This committee is charged with the responsibility for promoting communications system planning to meet future needs as well as promoting the efficient operation of the country's highway system for public safety and convenience.

5. Commenter agrees with the Commission that the most feasible approach to providing effective and improved TIS service as well as to increase the number of locations where TIS stations can provide adequate service, is to permit the use of 1700 kHz for TIS operations on an exclusive basis. AASHTO Committee also believes that this channel would be the most desirable to use because interference would be negligible on the upper band- edge side and, with appropriate power adjustments, interference would be minimal to other broadcast services on the lower adjacent channels. In addition, the problem of many AM radios not being able to tune outside the band-edge, as in the present situation with 1610 kHz, would be eliminated.

6. Based on information provided by state and local governments and by federal agencies, AASHTO Committee notes that requirements to provide emergency or informative highway data, highway services availability and localized weather information are increasing significantly. Current TIS operations on band-edge channels with fixed power and antenna characteristics do not always provide reliable service. In order to ensure that the public can receive this important information, commenter states that not only is it necessary to provide an in-band channel for TIS, but also it is important to establish technical criteria that will ensure an adequate signal level for the required service area. In its view this means establishing a field strength contour system similar to that used by the AM Broadcast Service.

7. Offshore Navigation, Inc. (ONI), was established in 1946 to provide "high accuracy radiopositioning services" in support of petroleum exploration and development. Other users of ONI's services include entities engaged in photomapping and hydrographic operations. Also, the United States Navy has engaged ONI to render "positioning" service in the speed and manuvering trials of the Navy's fleet ballistic missile submarines for more than twenty years.

8. ONI's comments are directed to the sharing criteria between broadcast and non-broadcast services. ONI is interested in this issue because currently the Radiolocation service is a secondary service at 1625-1705 kHz. Commenter's "SPOT" spread spectrum system operates in this frequency range with an emission bandwidth of 156 kHz. The system is operated from coastal locations to provide coverage over the offshore waters. The SPOT system enables the radiolocation operator to maintain precise position control at distances of 350-400 miles from shore. According to ONI, the operation of its spread spectrum system poses no threat of harmful interference to AM broadcast service. The SPOT system is operated along the coastlines and provides service to the offshore waters, away from populated areas where AM broadcast stations operate. Furthermore, commenter submits that locating stations along shore easily can be coordinated with AM broadcast stations.

9. In particular, ONI objects to use of the procedure suggested in the *Third Notice* for establishing sharing criteria between broadcast and non- broadcast services. The *Notice* mentioned that one possible model for defining the relationship between the allotments in the broadcast service and the permitted services, fixed and mobile, may be found in Article 6 of Appendix 30 of the International Radio Regulations. In that Article, terrestrial stations in a band planned by the Broadcasting Satellite (BSS) are made subject to additional procedures. These procedures require that any proposed fixed or mobile service registration be examined by the IFRB to determine if there is a probability of harmful interference to the assignments in the BSS Plan. ONI believes that such a procedure might result in a virtual ban upon the licensing of its services. It argues that the IFRB reviews terrestrial assignments due to the international service aspects of the broadcasting - satellite assignments and the relatively high power of terrestrial stations. However, ONI states that spread spectrum systems do not produce a field strength in excess of 120 microvolts per meter per square root Hertz at one mile from the transmitter site. Thus, ONI believes the above-described procedure would be inappropriate for Radiolocation services such as its own. Instead, it seeks to rely on No. 342 of the International Radio Regulations to permit operations that do not result in interference.

## FOOTNOTE FOR APPENDIX C

[1] Comments and reply comments were due in response to the *Third Notice of Inquiry* on September 8, and September 23, 1987, respectively. Although the comments of the American Association of State Highway and Transportation Officials were late-filed, they will be accepted as their consideration is not prejudicial to any party and they were late by only one day. No reply comments were filed in response to the *Notice*.



☆ U.S. GOVERNMENT PRINTING OFFICE: 1988— 201-708/80016